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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 167

THE UNITED STATES OF AMERICA, APPELLANT,

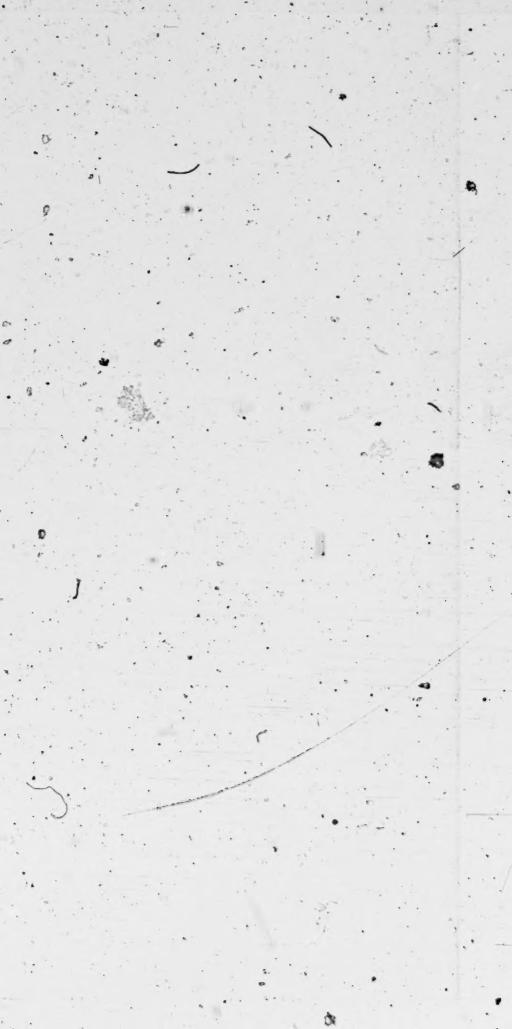
VS.

JOSEPH KAHRIGER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED JULY 1, 1952

PROBABLE JURISDICTION NOTED OCTOBER 15, 1952



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 167

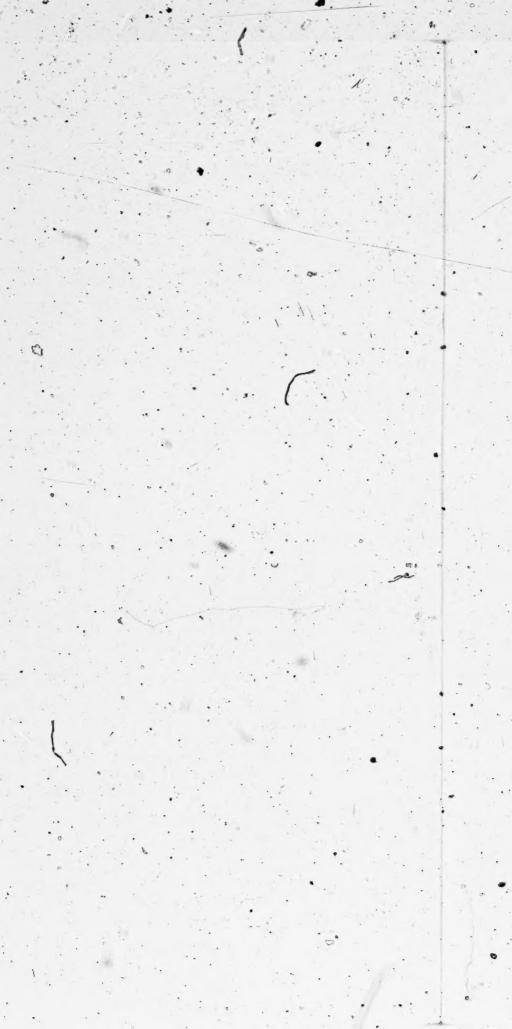
THE UNITED STATES OF AMERICA, APPELLANT,

JOSEPH KAHRIGER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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1 In United States District Court or the Eastern District of Pennsylvania

Criminal No. 16672

UNITED STATES

228.

JOSEPH KAHRIGER

Jacob Kossman, Esq.

DOCKET ENTRIES

1952

1 Mar. 17 Information, filed.

- 2 Mar. 17 Motion and Order for Bench Warrant filed. Bench Warrant exit.
- 3. Mar. 19 Appearance of Jacob Kossman, Esq., for defendant, filed.
 - 4 Mar. 20 Defendant's motion to dismiss information, filed.
- 5 Mar. 24 Bench Warrant returned: "On Mar. 19, 1952 executed", and filed.

Mar. 28 Bond of defendant in \$500, with Peerless Cas. Co. as surety, filed.

Apr. 24 Plea:-Not Guilty.

Apr. 28 Argued sur defendant's motion to dismiss information. C.A.V.

- '6 Apr. 29 Defendant's exhibits 1, 1a, 2, 3 & 4, filed.
 - 7 Apr. 29 Transcript of plea, filed.
 - 8 May 6 Opinion, Welsh. J., granting motion to dismiss, filed.
- 9 May 6 Order of Court dismissing Information, filed. 5/7/52 Noted. (Copies Mailed)
 - 10 June 5 Government's notice of appeal, filed.
 - 11 June 5 Copy of Clerk's Statement of Docket Entries, filed.
 - 12 June 5 Government's Statement as to Jurisdiction, filed.
 - 13 June 5 Government's Designation of Record on Appeal, filed.
- 14 June 6 Certificate of service and acknowledgment thereof of notice of appeal, filed.

In United States District Court

[Title omitted]

Willful failure to register for and pay special occupational tax on wagering.—Title 26 U.S.C. Secs. 3294, 2707(b)

INFORMATION-Filed March 17, 1952

The United States Attorney charges:-

Count I.

That on or about November 26th, 1951, at Philadelphia in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, Joseph Kahriger did engage in the business of accepting wagers and did accept wagers, as defined in Title 26, U.S.C., Section 3285, and has willfully failed to pay the special occupational tax imposed by Title 26, U.S.C. Section 3290, due and owing to the United States of America for the year ending June 30, 1952, in violation of Title 26, U.S.C. Sections 3294 and 2707 (b).

The United States Attorney charges:-

Count II

That on or about November 26th, 1951, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, Joseph Kahriger did engage in the business of accepting wagers and did accept wagers, as defined in Title 26 U.S.C. Section 3285, and has willfully failed to register for the special occupational tax as required by Title 26 U.S.C. Section 3291, in violation of Title 26 U.S.C. Sections 3294 and 2707(b).

(S.) GERALD A. GLEESON, United States Attorney.

3/12/52

3-4 Duly sworn to by Gerald A. Gleeson. Jurat omitted in printing.

In United States District Court

[Title emitted]

Motion to Dismiss the Information-Filed March 20, 1952

The defendant moves that the information be dismissed on the following grounds:

The statute on which the information is based is unconstitutional in that:

It is a penalty under the guise of a tax; in that it is arbitrary and unreasonable; in that it attempts to regulate by a so-called "tax" an activity which is entirely within the jurisdiction of the state; in that it is not uniform throughout the United States but excludes wagers placed in a wagering pool conducted by a pari-mutual wagering enterprise licensed under state law, and wagers made by people who are not in the business and unreasonably exempts many other forms of wagers; in that it compels a person to be a witness against himself.

(S.) JACOB KOSSMAN,
Attorned for the Defendant,
1325 Spruce St.

6 In United States District Court for the Eastern District of Pennsylvania

No. 16672

UNITED STATES OF AMERICA

V8.

JOSEPH KAHRIGER

OPINION SUR MOTION TO DISMISS THE INFORMATION—Filed May 6,

WELSH, J .:

The defendant, Joseph Kahriger, was proceeded against criminally by Information filed on March 17, 1952. The Information alleged that the defendant was in the business of accepting wagers and that he willfully failed to register for and pay the occupational tax as required by the Act of October 20, 1951, C. 521, Title IV, Sec. 471(a), 65 Stat. 529, 26 U.S.C., Sec. 3290 and 3291. The defendant has filed a Motion to Dismiss the Information on the ground that the law is unconstitutional for various reasons set forth in his briefs.

The question presents many features in connection with taxation that have been the subject of dispute and decisions for the Appellate Courts of the land. At the outset, we decide to recognize the principle that the power of the Congress of the United States to levy taxes is and should be free from judicial control unless the fundamentals of the Constitution of the United States are violated. We recognize the exclusive power of the Congress in the field of legislative enactment, and we recognize it as the only vehicle to express the judgment of our people on the delicate matter of finance.

We also are scrupulously meticulous in confining to the Judiciary their peculiar and limited responsibilities in interpreting such legislation. This concept of the judiciary however, requires a recognition of the fact that while the judiciary can express no opinion as to the wisdom of tax legislation or any motives that might have prompted such legislation, the Judiciary has the sacred responsibility of guarding the people against invasion of constitutional rights and protecting the States from an invasion of their Sovereign rights under the guise of taxation when the constitutional safeguards are endangered.

A careful consideration of the cases cited in the briefs submitted by both sides convinces this Court that the subject matter of this legislation so far as revenue purposes is concerned is within the scope of Federal authorities. In other words it is quite clear that the revenue objective of the legislation in question is clearly within the scope of the powers of Congress to express. We desire to say that at the outset, because if there was nothing more to the case than the question of vagueness of the tax, and the discriminatory nature of the tax, the defendant's position would be untenable. But the legislation goes much further than a piece of taxing legislation. It imposes a tax deemed by the Congress fair and reasonable, exempts certain types of wagering and wagerors, which to Congress seemed wise, and requires certain information, which appear to be constitutionally legitimate. This, we think, fairly summarizes the revenue and taxing features of the legislation. If it stopped there the legislation would undoubtedly be sound, but it does not stop there.

When the Act departed from the field of taxable legislation and went into the field of morals and invaded the sanctuary of State control it then became and now is the subject of judicial inspection. In the remarks that we feel constrained to make on this measure we feel it our duty, due to the critical conditions prevailing in our social life of today, to say that we recognize the high purposes of the Congress to curb a present and a growing evil. A person would indeed be blind today if he were not to recognize that the great increase in gambling and forms of related vice has reached a stage that unless controlled or curtailed will undermine the very pillars of our social order and sap the very lifeblood

of our National body. We are convinced from our long contact with the Congress and its members that they must have been appalled by the conditions existing, especially in our big rities, by the revelations of their own congressional investigations.

Now, notwithstanding the laudable and even holy purposes to curb this growing evil, had they the right under the guise of a taxing power to also require that certain information be furnished which is peculiarly applicable to the applicant from the standpoint of law enforcement and vice control? The applicant for registration among many things is required to give the names of other persons, both real and alias, or style, with address of business and residence. Failure to give this information and to comply with the law in certain respects would subject the applicant to a fine of ten thousand dollars (\$10,000) and an imprisonment of five (5) years. This feature of the legislation is presented to throw light on the question as to whether this portion of the measure is a tax bill or a police measure. Is the purpose of the Act and delegation of bureaucratic powers to create revenue or to constitute a host of informers?

In addressing ourselves to the above question we found it necessary to consult the many decisions submitted to us by the parties and these suggested by our own research. A review of the cases serves

to throw light upon the progressive character of our revenue laws and reveals the influence brought upon the Congress and the Courts by the economic conditions of the various periods of our development. They clearly show, as in the case of the Firearms Act and the legislation on oleomargarine, and various excise taxes, the impingement of industrial and economic pressure. It would be unwise to give any particular case as a complete authority on the subject without considering the background of each particular case. As we have said, the history of the Act involved in this . case has been progressive. But it seems to us that the case which most clearly reveals the silver thread of truth as contained in the decisions is to be found in the case of United States v. Constantine, 296 U. S. 287, decided by the United States Supreme Court on December 9, 1935. That case was one wherein the Federal Government levied what the Court declared o be a valid federal excise tax on retail liquor dealers. The excise tax was twenty-five dollars (\$25.00) but the amended Act imposed a special excise tax of one thousand dollars (\$1,000) on such dealers when they carry on the business contrary to local, state or municipal laws and provided a fine and imprisonment for failure to pay. (It will be observed that the 18th Amendment to the Constitution was then in force.)

We quote, in part, from the opinion of Mr. Justice Roberts in the above case, United States v. Constantine, as follows:

"In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a

6 . 9

special tax. If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name. Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of state law, and as such beyond the limits of federal power."

"The condition of the imposition is the commission of a come. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue. Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is

to impose a penalty as a deterrent and punishment of

10 · unlawful conduct.

"We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of state law as such are too strong to be disregarded, remove all semblance of a revenue act, and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the States, reserved from the grant of powers

to the federal government by the Constitution."

"We think the suggestion has never been made-certainly never entertained by this Court-that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives."

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a state

law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State." (underscoring supplied)

No language that we could use would more clearly or more forcefully express the law of the land on this subject. In addition to its being the pronouncement of the Supreme Court of the land on the principle involved, and by which we are bound, we find ourselves in full accord with it, both in letter and in spirit. Today, the simplicity of our former way of life has largely disappeared. Our economic enterprises are myriad. While the desire to curb the

underworld activities is a wholesome tribute to our fundamental aspirations, if the fundamental principles claimed by the federal government in this particular case were given the highest Judicial approval, future acts of Government in a field not so free from improper motives, would enable the Central Government to regulate our lives from the cradle to the grave. The remedy would be far worse than the disease.

The Motion to Dismiss is granted.

12

In United States District Court

[Title omitted]

ORDER DISMISSING INFORMATION-Filed May 6, 1952

And Now, this 7th day of May 1952, in accordance with the Opinion of the Court filed May 6, 1952, it is ordered that the information filed in the above entitled case, be and the same is hereby dismissed.

(S.) GEO. A. WELSH,

13

In United States District Court

[Title omitted]

Notice of Appeal-Filed June 5, 1952

The United States hereby appeals to the Supreme Court of the United States from the order of the United States District Court for the Eastern District of Pennsylvania, entered May 7, 1952, dismissing the information charging the defendant with wilfully failing to pay the occupational tax of \$50.00 per year as required by 26

U.S.C. 3290, and with failing to register with the collector of his district as required by 26 U.S.C. 3291, all in violation of 26 U.S.C. 2707 (b), and 3294.

(S.) PHILIP B. PERLMAN,
Solicitor General
Department of Justice,
Washington, D. C.

Dated June 5, 1952

14-28 Acceptance of service of appeal papers (omitted in printing)

29 DESIGNATION OF RECORD ON APPEAL—(omitted in printing)

29a Clerk's Certificate to foregoing transcript omitted in printing.

[Title omitted]

30 In United States District Court



DEFENDANT'S EXHIBIT 1

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

1. Return for period from to June 30, 19. 2. Full name (Print true name followed by (rade name) 3. Address Business Residence (Date issued) 4. Show by X in one of the following squares nature of application: First application Renewal Change of address (Date) (Registration number Change of ownership (Date) Former owner 5. Name of members of firm or partnership, or officers of corporation. Dollars . Penalty..... Total.... Make remittance payable to "Collector of Internal Revenue." Payment may be made only by cash, certified check, cashier's check, or money order. Internal Revenue." Payment may be made only by cash, certified check, cashier's check, or money order.

(If more space in required for items 6 (a), 6 (c), or 7, continue on reverse side or attach additional sheets, identifying each sheet and entry as to item number.) 6. Are you engaged in the business of accepting wagers for your own account? Yes E No (check one). If yes, complete, (a), (b), and (c) of this item. (a) Name and address where each such business is conducted. Name of location 9 9 (b) Number of employees or agents engaged in the business of receiving wagers on your behalf (c) True name and residence address of each such person. City and State 7. Do you receive wagers for or on behalf of some other person or persons? Yes \(\subseteq \text{No (check one)}. If yes, give name and residence address of each such person. I declare under the penalties of perjury that this application (including any accompanying statement or lists) is hereby made pursuant to subchapter B, 27A, Internal Revenue Code, for the period indicated above to cover the wagering business or businesses stated and at the locations specified has been examined by me, and to the best of my knowledge and belief is true and correct. (Signature)

This return must be filed with the Collector of Internal Revenue for your district (see par. 3 of instructions for proper place of filing), accompanied by remittance, on or before the last day of the month in which limiting is incurred in order to avoid penalties.

(State whether individual owner, member of firm, or if corporation officer, give title

INSTRUCTIONS

(For full instructions see Regulations 132)

PARAGRAPH 1 (a).—Under the provisions of section 3290 of the Internal Revenue Code every person who is liable for the 10-percent excise tax imposed by section 3285 of the Code, and every person who is engaged in receiving wagers for or on behalf of any person so liable, is subject to a special tax of \$50 per year.

(b) Section 3285 of the Code defines the term "wager" to mean (1) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (3) any wager placed in a lottery conducted for profit.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (1) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101 of the Code, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

PARAGRAPIA 2.—Special tax liability is computed from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July, the rax to be remitted is computed by multiplying the monthly rate of \$4.162/3 by the number of months remaining in the fiscal year. If the amount resulting involves a fraction, the full cent must be included. Example: If a person first commences business in November, liability should be computed as follows: \$4.162/3 × 8, the number of months

Items 6(a), 6(c), or 7 (continued)

remaining in the fiscal year, equals \$33.331/3, or \$33.34, the amount to be remitted.

PARAGRAPH 3.—The return must be filed with the Collector of Internal Kevenue for the district in which is located the taxpayer's office or principal place of business (or if he has no office or principal place of business in the United States, with the Collector of Internal Revenue, Baltimore, Maryland). If the return is not filed with the collector during the month in which liability began, the penalty prescribed by section 3612 (d) of the Internal Revenue Code, may be incurred. In addition, under the provisions of section 3294 of the Code any person who does any act which makes him liable for the special tax, without having paid such tax, shall be fined not less than \$1,000 and not more than \$5,000. For willful failure to file a return or pay the tax, the penalties under section 2707 may be imposed.

PARAGRAPH 4.—The information called for on the return must be completely furnished. If not so furnished, the special tax stamp will not be issued. Where the taxpayer is an individual, his true name must be entered in Item 2, followed by his alias, style, or trade name, if one is used, and both his residence and business addresses in Item 3. The special tax stamp may not be issued in a trade name only.

PARAGRAPH — Change of place of business or residence address must be registered with the Collector of Internal Revenue within 30 days after such change, or liability to additional tax and penalty will be incurred.

PARAGRAPH 6:—Under the general provisions of section 1001 of Title 18 of the United States Code, whoever knowingly makes any false or fictitious statement with respect to the payment of the special tax, such as the giving of a false name or address, may be fined not more than \$10,000 or imprisoned not more than 5 years, or both.

Item No. Name Street address City and State

FORM 730	DEFENDANT'S EXHIB	IT 1a TAV	ON	WACEDING
Treasury Department Internal Revenue Servi	ce	IMA	UN	MAGENING

(Section 3285 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return. (Signed) (Date)	 Gross amount of wagers accepted during month (not including lay-offs accepted). Gross amount of lay-off wagers accepted during month (See instruction 3). Sum of items 1 and 2. Tax (10 percent of item 3). Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b)). Net tax due (item 4 less item 5).
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)	MONTH Penalty \$ Interest \$ Total due. \$

ORIGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue.

IMPORTANT.—Follow instructions carefully

16-65501-

ba

INSTRUCTIONS (For full Instructions see Regulations 132)

1. LAW.—The Internal Revenue Code imposes a tax upon wagers accepted on or after November 1, 1951.

Section 3285. Tax.—

(a) Wagers.—There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions.—For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery' includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax.—Each person who is engaged in the business

of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax.—No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

(f) Terkitorial extent.—The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

2. RETURNS AND PAYMENT OF TAX.—All taxes are due and payable without any assessment by the Commissioner or notice from the collector. Return, with remittance, covering the tax due under section 3285 for any calendar month must be in the hands of the collector of internal revenue (cr his authorized representative) for the district in which the office or principal place of business of the taxpayer is located (or if he has no office or principal place of business in the United States, the Collector at Baltimore, Maryland), on or before the last day of the succeeding month; however, the Commissioner has authority under the law to require the immediate filing of a return and payment of the tax, when such action becomes necessary.

3. LAY-OFF WAGERS.—A taxpayer who accepts a lay-off wager from another taxpayer shall report such amount in item 2 of the return

U. S. GOVERNMENT PRINTING OFFICE 16-65501-1

TAX ON WAGERING

(Section 1925 of the Internal Revenue Code)

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)	Total due. \$
Cruit Chief For Hill Address Ave Brokensivian No.	Interest\$
	Penalty \$
nal Revenue at Washington, D. C. Checks or money orders should be made payable to the Collector of Internal Revenue. (See instructions, par. 2, on reverse of form.) If you have nothing to report, make notation to that effect on this form and return to the Collector of Internal Revenue. If final return is filed, the return should be marked "FINAL RETURN."	 4. Tax (10 percent of item 3)\$ 5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))\$ 6. Net tax due (item 4 less' item 5)\$
IMPORTANT.—Return with remittance should be sent to the Collector of Internal Revenue for your district and NOT to the Commissioner of Inter-	3. Sum of items 1 and 2 \$
This copy should be carefully preserved by the taxpayer at his place of business as a part of his records, and should at all times be available for inspection by officers of the Bureau of Internal Revenue. See paragraph "Records" under instructions.	1. Gross amount of wagers accepted during month (not including lay-offs accepted) \$ 2. Gross amount of lay-off wagers accepted during month (See instruction 3) \$

DUPLICATE RETURN.—Do not send to the Collector of Internal Revenue. IMPORTANT.—Follow Instructions carefully

10-05:01-1

and shall retain a copy of the certificate furnished the taxpayer making the lay-off wager.

- 4. CREDITS—(a) Seperal credits.—Any person who overpays the tax die with one monthly return may take credit for the overpayment against the tax due with any subsequent monthly return. If a credit is taken, a statement fully explaining the reason such credit is claimed must be attached to the return. This statement should also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, I is been filed; and should list each amount making up the total of the credit, monthly return on which reported, date of payment and, if the tax was paid with respect to more than 1 month, the exact amount of the credit chargeable to each month. A complete and detailed record of all credits must be kept by the taxpayer for a period of at least 4 years from the date the credit was taken. No credit shall be allowed, however (except as provided in the succeeding paragraph), whether in pursuance of a court decision or otherwise, unless the taxpayer establishes (1) that he has not collected the tax either as a separate charge or as part of the wager with respect to which it was imposed, or (2) that he has repaid the amount of the tax to the person making the wager or has secured the written consent of such person to the allowance of the credit. If the credit relates to overpayment of tax with respect to a laid-off wager, the taxpayer must also establish that the tax was not collected by any person, and if collected, that the tax has been refunded to the person who placed the wager originally, or that he has secured the written consent of such person to the allowance of the claim:
- (b) Lay-off credits.—Under section 3286 (b) a credit may be allowed a taxpayer for tax paid by him or tax due with respect to any wager, if such wager was laid off with another taxpayer who is liable for tax with respect to such laid-off wager. If such a credit is taken, the taxpayer must attach to the return a statement fully explaining the reason such credit is

claimed. This statement should also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed; and should list each amount making up the total of the credit, monthly return on which reported, date of payment and, if the tax was paid with respect to more than 1 month, the exact amount of the credit chargeable to each month. In addition, there must be attached to the return certificates in the form prescribed in Regulations 132. A complete and detailed record of all credits must be kept by the taxpayer for a period of at least 4 years from the date the credit was taken. No interest is to be allowed with respect to any such credit.

A claim for refund may be filed in any case where a credit may be taken. If claim for refund is filed, the evidence required in the case of a credit must be submitted with the claim for refund.

- 5. RECORDS.—Records shall contain sufficient information to enable the Commissioner to determine the taxability of the transactions and the amount of tax due, and shall at all times be open to the inspection of internal-revenue officers. Such records, including duplicate copies of returns, shall be kept for a period of at least 4 years from the date the tax is due.
- 6. PENALTIES AND INTEREST.—Failure to file on time: 5 percent of the tax if the failure is for not more than 30 days, with an additional 5 percent for each additional 30 days or fraction thereof during which the delinquency continues, not to exceed 25 percent in the aggregate. Failure to pay on time before assessment, interest at the rate of 6 percent per annum. Failure to pay within 10 days after issuance of notice and demand based on assessment approved by Commissioner, 5 percent penalty and interest on assessment at rate of 6 percent per annum. Severe penalties for willful failure to pay tax, keep records, file returns, or for false or fraudulent returns are imposed by the Internal Revenue Code.

U. S. SOVERNMENT PRINTING OFFICE 16-65301-1

3

The Philadelphia Inquirer

TUESDAY MORNING, FEBRUARY 19, 1952 ht 21

Major Gamblers Face Indictment Over \$50 Stamp

Gleeson Preparing Several Cases for Federal Grand Jury

Indictments charging several well-known gamblers in this area with failing to purchase \$50 tax stamps required by the new Federal law are being prepared for a grand jury now sitting in the U. S. District Court.

U. S. Attorney Gerald A. Gleeson said yesterday his staff was working on "several cases," but would not speculate when indictments would be ready for the jury's consideration.

COMPLAINTS FORWARDED

Meanwhile, it was learned that a number of complaints had been turned over to the Federal prosecutor's office by Francis R. Smith, Collector of Internal Revenue.

According to the collector's records, released yesterday, 54 persona in his First Collection District of Pennsylvania so far have purchased the stamps. All, however, were described by a revenue spokesman, as "minor figures" in the gambling world.

Among those from the Philadelphia area who purchased the stamp on or after Nov. 1, 1951, the effective date under the law, were:

Chauncey Armstrong, Cleveland near Susquehanna aves.; Joseph Di-Dio, 17th st. near Edgeley; Rose Elizabeth Fulgenzio, Osage ave. near 44th st.; Herman Gecker, Pennsgrove st. near 39th; James Hilsee Garnet st. near Snyder; Harry Jacobs, Gordon st. near 32d; Illiam Knott, Ashmead st. near Wakefield, and Joseph Loscalzo, 12th st. near Catharine.

Also Christy Nicholas, 3d st. near Lombard; Louis Renzulli, Mervin st. near Fitzwater; Harvey Royal, Berks st. near 23d; Morris Schurr, 17th st. near Master; Clifford Schweigart, George st. near Columbia ave.; Marty Louis Sgro, Mercy st. near 20th; Stewart George, 11th st. near Berks; John Warner, 87th ave., near Tinicum st.; Edward Melwig, Somerset st. near 20th, and Charles Rehr, 10th st., near Master. FROM OTHER COUNTIES

Those listed from other counties included:

Clarence J. Arndt, Middletown; Walter C. Beeler, and Harry Boger, Lebanon; James Joseph Campbell, Marcus Hook; Chris Coumanis, Oxford; Antonio Phillip DiNatali, Ardmore.

Lloyd S. Farrel, Lancaster; George L. Fortuna, Lebanon; Edward V. Gavin, Sr., Phoenixville; Paride A. Giaquinto, Bethlehem; Ann Elizabeth Heckman, Hamburg; Donald Charles Heckman, Hamburg; James Bernard James, Shartelsville; Arthur D. Killmoyer, Lebanon.

John Albert Kirk, Oxford; John Kornberg, Conshohocken; Paul W Krause, Quentin; James W. Lauer Lebanon; Edward Lutz, Jr., Shartelsville; Samuel Isaac Lutz, Lebanon; Peter Michniewicz, Shenandoah; Samuel A. Pinkerton, Oxford

Mary C. Posta and George Rapp Reading: Bertha Rentschler, Hamburg: Elsie Schlappig, Bichland; Albert Shanko, Lester; James P Sims, Oxford; Andrew L. Snell, Lebanon; William Stephens, Newmanstown; Beatrice E. Stootd, Bernville.

Laura Sweitzer, Hamburg; John Edgar Tawney, Gettysburg; Thomas J. Welsh, Chester, and John Fulkerson Wolf, R. D. 4, Pottstown.

Phila. Police Told to Aid Registry of Bookies

Philadelphia police were given orders yesterday to cooperate with the Federal Government in the enforcement of its new \$50 license tax on bookmakers by compiling detailed weekly lists of all arrests for bookmaking and process for bookmak

numbers writing.

The Federal law went into effect Nov. 1. Since that time the office of the Collector of Internal Revenue has had machinery set up for issuing such licenses, but has bad no takers.

has had machinery set up of issuing such licenses, but has had no takers. In a special notice sent to all Police Inspectors seterday Superintendent of Police Howard P. Sutton gave them instructions as to listing arrests.

"A Federal law which went into

ADVERTISEMENT

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In minutes Resinel gives hours of glad relief from madening irritation and italic of "externally-caused blotches, blemishes, pimples, blackheads. Acts to prevent "scratch infection." And the color of Resinol is fine to help hide embarrassing akin areas while it side nature to speed healing. Start using soothing, gentle, wonderful Resinol Oliment today.



Ohio State PORT

\$1.31

TO OPEN TOWN

effect Nov. 1, 1951, requires each person engaged in the numbers game or bookmaking business to pay a special tax of \$50 a year, and to register with the Collector of Internal Revenue his name, residence and place of business where the activity which makes him liable is carried on," the notice said.

"In connection with the above, you shall on Monday, Nov. 19, 1951, and every Monday thereafter, submit a typewritten report in triplicate to this office, listing the name, residence, age and color of each person arrested during the previous week for engaging in bookmaking or the numbers game, stating specifically the charges on which each was arrested."

3 Areas Go Dry As Mains Break

Hundreds of residents in three widely separated sections of the city were without water/yesterday when three six-inch water mains broke.

Water Bureau rews shut off the flow of water in the area of 2d and Laurel sts., Kensington, when the first break sent vater bubbling through the streets in several places near the intersection.

Police set up barricides to halt heavy truck traffic but golleys kept running in the area after PTC crews tested the street.

A main break at 19th and Ludlow sts. sent water flowing over the streets until it was shut of while repairs were being made. Traffic on Ludlow between 18th and 19th was halted.

At 12th and Pearl sts, another main broke and Water Bureau repairmen shut off the water in that neighborhood while making repairs. Additionally, water began to flood the 2700 block S. Hutchinson st, and water was shut off there. The cause of that seepage was not determined.

Mack in Germany

BONN, Germany, Nov. 15 (UP).— Representative Peter F. Mack, the

"Plying Go arrived in Luxembour



Nation Con STAI



GAMBLER TAX YIELD FAR SHORT OF GOAL

-Law Agents Are Scarce

WASHINGTON, March 8 (P) no immunity when they do.

Based on current collections the annual revenue from the new gam-shires have registered in all but the series will end in late S gamblers have registered in all but the series will end in late S ber with final plantings of the \$400,000. In stead of the \$400,000. In series will end in late S ber with final plantings of lection districts: lower Manhattan. In addition to traditic those who registered have reported in all but the series will end in late S ber with final plantings of lection districts: lower Manhattan. In addition to traditic those who registered have reported in all but the series will end in late S ber with final plantings of lection districts: lower Manhattan. In addition to traditic those who registered have reported in all but the series will end in late S ber with final plantings of lection districts: lower Manhattan. In addition to traditic in business and paid no excise tax as yet.

optimistic estimates because they! Only two gamblers have regis-tur

do not have enough enforcement tered in New Mexico and Wisconclose their names and addresses as in Rhode Island and seven in South required by law.

The new law puts a 10 per cent.

tax on all money handled, not just TOP ROSE TO APPEAR HERE 400 Million 'Aim' of Congress of 550 a year on all bookies, numbers and lottery operators, and All America Winner to Be See punchboards, 'all of which are lilegal in most states. It forces gam-blers to give their names and A places of business, but gives them will

The Burgau of Internal Revenue as yet.

The Burgau of Internal Revenue as yet.

Louisiana gamblers apparently be marked by azalea are doing the nation's boom business in betting—they paid \$167,987 in taxes on their gambling take for part of November and all of Dereation, December, gamblers reported that they took in \$7,591. handled \$1,679,879. Illinois is sectionable to the As-American and they had they paid the required 10 or with \$140,410 in taxes and lilies will go on the per cent tax, which amounted to about \$759,200.

This brought to \$970,964 the total

This brought to \$970,964 the total However, in the number of regular tions since Nov. 1. In addition, leads the list with 3,056, almost a in varied horself time in January and paid their \$50 occupational stamp tax, there, with a samplers face no geranium raising the number of admitted threat from the law on that score. Nimety registered in New York shown gamblers to 16,029.

Ninety registered in New York shown
Government officials say revestate, putting it quite far down summ
nue is running far below original on the list.

agents and because many gam-blers are quitting rather than dis-Maine, six in New Hampshire, nine Dakota.

ries of hight floral disp' will begin in the Channel Gar at Rockefeller Center on Mar



36-37

[File endorsement omitted]

Supreme Court of the United States

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed October 15, 1952

Pursuant to Rule 13, paragraph 9 of this Court, appellant states that it intends to rely upon the following points:

- 1. The District Court erred in holding that the Act of October 20, 1951, c. 521, Title IV, Sec. 471(a), 65 Stat. 529, 26 U.S.C. § 3285, et seq., which imposes an excise tax on wagers and an annual occupational tax on persons in the business of accepting wagers, and requires persons subject to said tax to register with the collector of internal revenue, is unconstitutional as a police measure in derogation of the police power reserved to the states by the Tenth Amendment.
 - 2. The District Court erred in dismissing the information.

Appellant deems the entire record, as filed in the above-entitled case, necessary for the consideration of the points relied upon.

ROBERT L. STERN, Acting Solicitor General.

October, 1952.

.)

Supreme Court of the United States, October Term, 1952.

No. 167

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 13, 1952.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Office - Supreme Court, U. S.

NO. 167

JUL 1 - 1952

CHARLES ELMORE Charles

In the Supreme Court of the United States

OCTOBER TERM, 1952.

SUPREME COURT. U.S.

THE UNITED STATES OF AMERICA, Appellant,

JOSEPH KAHRIGER.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

STATEMENT AS TO JURISDICTION.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 16672 Criminal

(Filed Jun. 5, 1952)

UNITED STATES OF AMERICA

V

JOSEPH KAHRIGER

Appeal from the United States District Court for the Eastern District of Pennsylvania.

STATEMENT AS TO JURISDICTION.

In Compliance with Rule 37(a)(1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the information.

OPINION BELOW

The opinion of the District Court dismissing the information has not been reported. A copy of the opinion is attached hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the information was entered on May 7, 1952. The jurisdiction of the Supreme Court to review on direct appeal the judgment of the District Court dismissing an information where the decision is based upon the invalidity of the statute upon which the information was founded, is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P. The following decisions sustain the jurisdiction of the Supreme Court: United States v. Doremus, 249 U.S. 86, United States v. Sanchez, 340 U.S. 42.

QUESTION PRESENTED

Whether the occupational tax provisions of the Revenue Act of 1951, which levy a tax on persons engaged in the business of accepting wagers, and require such persons to register with the collector of internal revenue, are unconstitutional because of incidental regulatory features of the registration section (26 U.S.C. 3291).

STATUTES INVOLVED

Section 471(a) of the Revenue Act of 1951 (c. 521, Title IV, 65 Stat. 529), provides, inter alia:

(26 U.S.C. 3290):

A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.¹

¹26 U.S.C. 3285(d) and (e) under subchapter. A define the persons liable for payment of the tax as follows:

(26 U.S.C. 3291):

- (a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—
 - (1) his name and place of residence;
 - (2) if he is liable for tax under subchapter , each place of business where the activity which makes his so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and
 - (3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.
- (b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.
- (c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

(26 U.S.C. 3294):

(a) Failure to pay tax. Any person who does any act which makes him liable for special tax

"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

"(e) Exclusion from tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law. and (2) on any wager placed in a coin operated device with respect to which an occupational tax is imposed by section 3267."

under this subchapter, without having paid such tax, shell, besides being liable to the payment of the tax, se fined not less than \$1,000 and not more than \$5,000.

(b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of \$50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of \$100, and the cost of prosecution.

(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

STATEMENT

On March 17, 1952, a two-count information was filed in the United States District Court for the Eastern District of Pennsylvania charging that defendant, being in the business of accepting wagers, as defined in 26 U.S.C. 3285, supra, (1) failed to pay the occupational tax of \$50 per year as required by 26 U.S.C. 3290, supra, and (2) failed to register with the collector of his district as required by 26 U.S.C. 3291, supra, in violation of 26 U.S.C. 2707(b), and 3294, supra.

The defendant moved to dismiss the information on the ground that the statute on which it is based is unconstitutional in that it constitutes a penalty in the guise of a tax; that is arbitrary and unreasonable; that it attempts to regulate an activity which is entirely within the jurisdiction of the state; that it imposes a tax which is not uniform, in that certain persons are excluded from its operation; and, finally, that it compels a person to be a witness against himself. In its opinion granting defendant's motion to dismiss (Appendix, infra), the District Court conceded "that the revenue objective of the legislation in question is clearly within the scope of the powers of Congress to express," that "it imposes a tax deemed by the Congress fair and reasonable," and that it "exempts certain types of wagering and wagerers, which to Congress seemed wise, and requires certain information which appear to be constitutionally legitimate." The District Court held, however, that because the information called for by the registration provisions (26 U.S.C. 3291, supra) was "peculiarly applicable to the applicant from the standpoint of law enforcement and vice control", the entire legislation falls as an infringement by the federal government on the police power reserved to the states by the Tenth Amendment to the Constitution.

THE QUESTION IS SUBSTANTIAL

The District Court conceded that the revenue features of the statute were a valid exercise of the federal taxing power, but held that the information called for by the registration provision (26 U.S.C. 3291, supra) was so manifestly designed to aid state law enforcement that the entire statute must be deemed an encroachment upon the reserved powers of the states.

It is not clear from the opinion whether the court considered the information required by the statute unrelated to the taxing power, or whether it intended to hold that, even though the information was perinent to enforcement of the tax, the regulatory effect of the statute nevertheless rendered it unconstitutional. On either interpretation, the decision is clearly erroneous.

The statute in all its aspects is a proper exercise of

² As the opinion of the court below concedes the validity of the special tax provision (26 U.S.C. 3290), the violation of which is charged in the first count of the information, it is not clear why that count was dismissed. The opinion below rested solely on the invalidity of the registration provisions (26 U.S.C. 3291), the breach of which is the foundation of the second count.

the taxing power. It fixes a reasonable tax on a lucrative business. The registration provisions merely require the person engaged in such business to specify his place or places of business and to specify, either the persons who carry on the business for him, or the persons for whom he carries on the business. Manifestly, such information is relevant and useful in the enforcement and administration of the tax.

These considerations, apparent from the face of the legislation, are reinforced by its legislative history. The occupational tax provisions of the Revenue Act of 1951 are in part the fruit of exhaustive inquiry into gambling by the Special Senate Committee to Investigate Organized Crime in Interstate Commerce acting pursuant to legislative mandate. S. Res. 202, 81st Cong. That committee found that organized gambling is a business that operates through a large interstate network of syndicates which employ interstate channels of communications as their medium. S. Rep. 2370, 81st Cong., 2d sess.; S. Rep. 141, 307, 725, 82nd Cong., 1st sess. It found that twenty billion dollars changes hands every year in the United States as a result of organized gambling (S. Rep. p. 141, 82nd Cong., 1st sess., pp. 13-14), and that the United States Treasury is being defrauded of perhaps hundreds of millions of dollars in revenues by those operating this business. It further found that gamblers customarily fail to keep books and records, and that it is extremely difficult, if not impossible, for the Government to establish through any bookkeeping methods, their real income . (S. Rep. 141, pp. 31-33, S. Rep. No. 307, 82nd Cong., 1st sess., pp. 4, 9). Against this background of legislative fact-finding, the Committee on Finance of the Senate, and the Committee on Ways and Means of the House of Representatives promulgated as part of the Revenue Act of 1951, the various provisions relating to taxation of gambling. Both committee reports make

it abundantly clear that a paramount consideration in enacting these wagering tax provisions was to obtain revenue (H. Rep. 586, p. 60; S. Rep. 781, p. 118, 82nd Cong., 1st sess.) In regard to the registration provision, both reports emphasize that "enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, the bills provide that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers" (Ibid.). Both committee reports estimate that the wagering taxes will yield \$400 million dollars per year in revenue (H. Rep. 586, supra, p. 54; S. Rep. 781, supra, p. 112).

In the light of such explicit congressional expression as to the purpose of the occupational tax provisions, it is clear that Congress has acted in the exercise of its taxing power. This Court has held that the reasonableness of the means employed to effectuate this legitimate function is solely for Congress to determine. United States v. Doremus, 249 U.S. 86, 89; McCray v. United States, 195 U.S. 27, 59; M'Culloch v. Maryland, 4 Wheat, 316, 421. Since, here, the tax on wagering was properly found by the District Court to be an exercise of the constitutional taxing power, the District Court was not warranted in substituting its judgment for that of Congress as to the pertinency to the act's requirement of the information called for by the registration provision (26 U.S.C. 3291, supra).

As noted above, Congress had ample basis for its conclusion that the required information is pertinent and essential to the enforcement of the taxes on wagering. Registration provisions have been held to be valid and necessary concomitants of other tax mea-

sures. Nigro v. United States, 276 U.S. 332. See also Sonzinsky v. United States, 300 U.S. 506, where this Court observed that the registration provisions of the National Firearms Act of 1934, Sec. 2, c. 757, 48 Stat. 1236, "are obviously supportable as in aid of a revenue purpose," p. 513.

In view of the fact that the registration provisions are a proper incident to a valid tax, the fact that they may also have a regulatory effect is constitutionally irrelevant. A taxing act does not fall because it has regulatory features touching activities which Congress could not otherwise regulate. This Court has repeatedly upheld tax provisions having a collateral regulatory purpose and effect. It has upheld the constitutionality of other closely analogous taxes (and concomitant administrative and regulatory provisions in aid thereof) levied on the business of conducting lotteries, the sale of liquor, the sale of firearms and the transfer of narcotic drugs.

United States v. Constantine, 296 U.S. 287, upon which the opinion below relies, is clearly distinguishable. There this Court held invalid a provision of the

Machine Co. v. Davis, 301 U.S. 548, 585; Sonzinsky v. United States, 300 U.S. 506; Magnano v. Hamilton, 292 U.S. 40; Hampton & Co. v. United States, 276 U.S. 394, 412; Nigro v. United States, supra; United States v. One Ford Coupe, 272 U.S. 321, 328.

⁴ United States v. Sanchez, supra (Marihuana Tax Act); Sonzinsky v. United States, supra (license tax on dealers in firearms). Alston v. United States 274 U.S. 289 (Harrison Narcotic Drug Act); United States v. One Ford Coupe supra (tax on intoxicating liquor and forfeiture previsions in connection therewith); United States v. Doremus, supra (Harrison Narcotic Drug Act); License Tax Cases, 72 U.S. 462 (special taxes on those engaged in certain trades, including those of selling lottery tickets and retail dealing in liquor).

Revenue Act of 1926, which imposed, in addition to a \$25.00 excise tax laid on all retail liquor dealers, an added "special excise tax" of \$1,000 on such dealers: who carried on the business contrary to local law: This Yourt held that such tax was clearly a penalty since it was conditioned solely on violation of state law, and was "grossly disproportionate to the amount of the normal tax." 269 U.S. at p. 295. This Court in that case clearly sanctioned occupational taxes which "look only to the fact of the exercise of the occupation or calling taxed, regardless of whether such exercise is permitted or prohibited by the laws of the United States or by those of a State." Ibid. at p. 293. moderate levy of \$50.00 here involved is not conditioned on the violation of state law, but rests alike on all persons within the occupational category, regardless of whether the taxed activities or occupation are legal or illegal. It is not a cumulative tax "grossly disproportionate" to the amount of a normal tax. It thus has none of the indicia of a penalty/in the guise of a revenue provision, which this Court found present in the Constantine case.

A three-judge court recently observed that the wagering tax provisions are constitutional, although it based its refusal to enjoin their enforcement on equitable principles. Combs v. Snyder, 101 F. Supp. 531 (D.C.D.C.), summarily affirmed by this Court 342 U.S. 939. Two recent federal district courts have upheld the constitutionality of the tax against contentions that such provisions constitute an infringement on the police power reserved to the states and on the privilege against self-incrimination. United States v. Forrester, No. 19,290 (N.D. Ga.), Feb. 29, 1952 (not reported); United State v. James W. Penn, No. 2021 (Mid D.N.C.), May 1952 (not reported).

It is submitted that the decision of the District. Court in the instant case is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted.

/s/ Philip B. Perlman, Philip B. Perlman Solicitor General.

May 1952.º

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 16672

Filed May 6, 1952

UNITED STATES OF AMERICA

V.

JOSEPH KAHRIGER

Sur Motion to Dismiss the Information

Welsh, J.

May 6, 1952

The defendant, Joseph Kahriger, was proceeded against criminally by Information filed on March 17, 1952. The Information alleged that the defendant was in the business of accepting wagers and that he will-tully failed to register for and pay the occupational tax as required by the Act of October 20, 1951, C. 521, Title IV, Sec. 471(a), 65 Stat. 529, 26 U.S.C., Sec. 3290 and 3291. The defendant has filed a Motion to Dismiss the Information on the ground that the law is unconstitutional for various reasons set forth in his briefs. The question presents many features in connection with taxation that have been the subject of dispute and decisions for the Appellate Courts of the land. At the outset, we decide to recognize the principle that the power of the Congress of the United States to levy taxes is and should be free from judicial control unless

the fundamentals of the Constitution of the United States are violated. We recognize the exculsive power of the Congress in the field of legislative enactment, and we recognize it as the only vehicle to express the judgment of our people on the delicate matter of finance. We also are scrupulously meticulous in confining to the Judiciary their peculiar and limited responsibilities in interpreting such legislation. concept of the judiciary however, requires a recognition of the fact that while the judiciary can express no opinion as to the wisdom of tax legislation or any motives that might have prompted such legislation, the Judiciary has the sacred responsibility of guarding the people against invasion of constitutional rights and protecting the States from an invasion of their Sovereign rights under the guise of taxation when the constitutional safeguards are endangered.

A careful consideration of the cases cited in the briefs submitted by both sides convinces this Court that the subject matter of this legislation so far as revenue purposes is concerned is within the scope of Federal authorities. In other words it is quite clear that the revenue objective of the legislation in question is clearly within the scope of the powers of Congress to express. We desire to say that at the outset, because if there was nothing more to the case than the question of vagueness of the tax, and the discriminatory nature of the tax, the defendant's position would be untenable. But the legislation goes much further than a piece of taxing legislation. It imposes a tax deemed by the Congress fair and reasonable, exempts certain types of "agering and wagerors, which to Congress seemed wise, and requires certain information which appear to be constitutionally legitimate. we think, fairly summarizes the revenue and taxing features of the legislation. If it stopped there the legislation would undoubtedly be sound, but it does not stop there.

When the Act departed from the field of taxable legislation and went into the field of morals and invaded the sanctuary of State control it then became and now is the subject of judicial inspection. In the remarks that we feel constrained to make on this measure we feel it our duty the to the critical conditions prevailing in our social life of today, to say that we recognize the high purposes of the Congress to curb a present and growing evil. A person would indeed be blind today if he were not to recognize that the great increase in gambling and forms of related vice has reached a stage that unless controlled or curtailed will undermine the very pillars of our social order and sap the very lifeblood of our National body. We are convinced from our long contact with the Congress and its members that they must have been appalled by the conditions existing, especially in our big cities, by the revelations of their own congressional investigations.

Now, notwithstanding the laudable and even holy purposes to curb this growing evil, had they the right under the guise of a taxing power to also require that certain information be furnished which is peculiarly applicable to the applicant from the standpoint of law enforcement and vice control? The applicant for registration among many things is required to give the names of other persons, both real and alias, or style, with address of business and residence. Failure to give this information and to comply with the law in certain respects would subject the applicant to a fine of ten thousand dollars (\$10,000) and an imprisonment of five (5) years. This feature of the legislation is presented to throw light on the question as to whether this portion of the measure is a tax bill or a police measure. Is the purpose of the Act and delegation of bureaucratic powers to create revenue or to constitute a host of informers?

In addressing ourselves to the above question we found it necessary to consult the many decisions submitted to us by the parties and those suggested by our own research. A review of the cases serves to throw light upon the progressive character of our revenue laws and reveals the influence brought upon the Congress and the Courts by the economic conditions of the various periods of our development. They clearly show, as in the case of the Firearms Act and the legislation on oleomargarine, and various excise taxes, the impingement of industrial and economic pressure. would be unwise to give any particular case as a complete authority on the subject without considering the background of each particular case. As we have said, the history of the Act involved in this case has been progressive. But it seems to us that the case which most clearly reveals the silver thread of truth as contained in the decisions is to be found in the case of United States v. Constantine, 296 U.S. 287, decided by the United States Supreme Court on December 9, 1935. That case was one wherein the Federal Government levied what the Court declared to be a valid federal excise tax on retail liquor dealers. The excise tax was twenty-five dollars (\$25.00) but the amended Act imposed a special excise tax of one thousand dollars (\$1,000) on such dealers when they carry on the business contrary to local, state or municipal laws and provided a fine and imprisonment for failure to pay. (Itwill be observed that the 18th Amendment to the Constitution was then in force)

We quote, in part, from the opinion of Mr. Justice Roberts in the above case, United States v. Constantine, as follows:

"In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to if the character disclosed by its purpose and operation, regardless of name. Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of state law, and as such beyond the limits of federal power."

"The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue. Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the tax-payer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct."

"We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of state law as such are too strong to be disregarded, remove all semblance of a revenue act, and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the States reserved from the grant of powers to the federal government by the Constitution."

"We think the suggestion has never been made—certainly never entertained by this Court—that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications from a decision sustaining such an imposition would be startling. The accession of such a power would open the door to admitted regulation of matters of state concern by federal authority. The regulation of the conduct of its

own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives."

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a state law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State." (Italics supplied)

No language that we could use would more clearly or more forcefully express the law of the land on this subject. In addition to its being the pronouncement of the Supreme Court of the land on the principle involved, and by which we are bound, we find ourselves in full accord with it, both in letter and in spirit. Today, the simplicity of our former way of life has largely disappeared. Our economic enterprises are myriad. While the desire to curb the underworld activities is a wholesome tribute to our fundamental aspirations, if the fundamental principles claimed by the federal government in this particular case were given the highest Judicial approval, future acts of Government in a field not so free from improper motives, would enable the Central Government to regulate our lives from the cradle to the grave. remedy would be far worse than the disease.

The Motion to Dismiss is granted.

LIBRARY SUFREME COURT, U.S.

No. 167

Office Supreme Court, U.3

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In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

JOSEPH KAHRIGER

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES



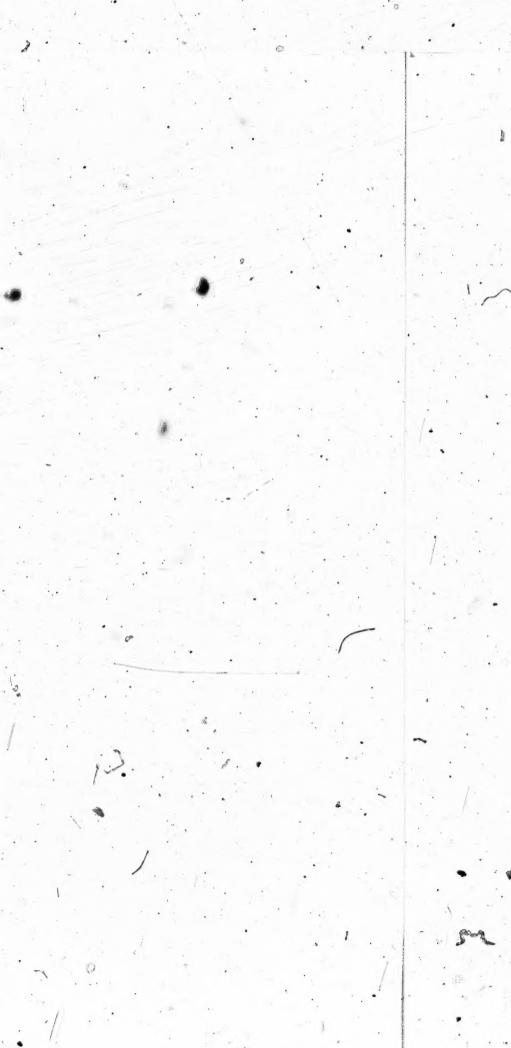
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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 167

UNITED STATES OF AMERICA, APPELLANT

v.

JOSEPH KAHRIGER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINION. BELOW

The opinion of the District Court (R. 3-7) is not reported.

JURISDICTION

The order of the District Court dismissing the information was entered May 7, 1952 (R. 7). A notice of appeal was filed on June 5, 1952 (R. 7). On October 13, 1952, this Court noted probable jurisdiction (R. 19). The jurisdiction of this Court is conferred by 18 U.S.C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the occupational tax provisions of the Revenue Act of 1951 (26 U.S.C., Supp. V, 3290) which levy a tax on persons engaged in the business of accepting wagers, and fequire such persons to register with the Collector of Internal Revenue, are unconstitutional because incidental regulatory features of the registration section (26 U.S.C., Supp. V, 3291) infringe the police power reserved to the states.

STATUTES INVOLVED

Section 471(a) of the Revenue Act of 1951 (c. 521, Title IV, 65 Stat. 529), provides, inter alia:

Subchapter A-Tax on Wagers.

[26 U.S.C., Supp. V, 3285].

(a) Wagers.*

There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(d) Persons liable for tax?

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who

[&]quot;Wager" is defined in Section 3285 (b) (1). It includes wagers in lotteries conducted for profit. Lottery is defined in (b) (2) so as to exclude drawings conducted by charitable organizations and games conducted in the presence of all the wagerers.

conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from tax.

No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated edevice with respect to which an occupational tax is imposed by section 3267.

Subchapter B—Occupational Tax

[26 U.S.C., Supp. V, 3250] .

A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

[26 U.S.C., Supp. V, 3291]

- (a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—
 - (1) his name and place of residence; o
 - (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

- (3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.
- (b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.
- (c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

[26 U.S.C., Supp. V, 3294].

- (a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000.
- (c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

STATEMENT

On March 17, 1952, a two-count information was filed in the United States District Court for the

Eastern District of Pennsylvania charging that defendant, being in the business of accepting wagers, as defined in 26 U.S.C., Supp. V, 3285, supra (1) failed to pay the occupational tax of \$50 per year as required by 26 U.S.C. Supp. V, 3290, supra, and failed to register with the collector of his district as required by 26 U.S.C., Supp. V, 3291, supra, in violation of 26 U.S.C., Supp. V, 3291, supra, in violation of 26 U.S.C. 2707(b), and 26 U.S.C., Supp. V, 3294, supra (R. 2).

The defendant moved to dismiss the information on the ground that the statute on which it is based is unconstitutional in that it constitutes a penalty in the guise of a tax; that it is arbitrary and un-. reasonable; that it attempts to regulate an activity which is entirely within the jurisdiction of the state; that it imposes a tax which is not uniform, in that certain persons are excluded from its operation; and finally, that it compels a person to be a witness against himself (R. 3). In its opinion granting defendant's motion to dismiss, the District Court conceded "that the revenue objective of the legislation in question is clearly within the scope of the powers of Congress to express," that "it imposes a tax deemed by the Congress fair and reasonable," and that it "exempts certain types of wagering and wagerers, which to Congress seemed wise, and requires certain information, which appear to be constitutionally legitimate." The District Court held, however, that because the information called for by the registration provisions (26 U.S.C., Supp. V, 3291, supra) was "pecularily applicable to the applicant from the standpoint of

law enforcement and vice control," the entire legislation falls as an infringement by the federal
government on the police power reserved to the
states by the Tenth Amendment to the Constitution
(R. 3-7).

SUMMARY OF ARGUMENT

The taxes on the business of gambling, which Congress estimated would produce large revenues, are a proper exercise of the federal taxing power. Their validity is established by the familiar line of cases running from the *License Tax Cases*, 5 Wall. 462, to *United States* v. Sanchez, 340 U.S. 42. These cases also demonstrate that a federal tax is not invalid because levied on an occupation unlawful under state law. See especially *License Tax Cases*, supra.

The registration provisions are valid because they have a direct relationship to enforcement of the validly-imposed tax. It obviously facilitates collection of a tax on a business to have the person° engaged in such business specify his name, address, and place of business and the names and addresses of the persons who carry on the business for him or for whom he carries on the business. The particular need for this type of information with relation to the gambling tax was made clear to Congress before the statute was enacted. See Committee Reports, cited infra. The fact that such registration provisions may incidentally aid state law . enforcement no more invalidates such provisions than the incidental effect of a tax in discouraging a business activity invalidates the tax. See McCray

v. United States, 195 U.S. 27. Many tax statutes contain registration and informational provisions similar to those found in the tax on wagering. Taxing statutes often require the disclosure of places of business and of information as to the identity not only of the taxpayers themselves but of other persons with whom they deal. When such statutes have been challenged, they have uniformly been upheld. In such cases the validity of the provisions for the disclosure of information has either been assumed or declared to be obvious. E.g., Sonzinsky v. United States, 300 U.S. 506.

This has been true with respect to the analogous provisions in the taxing acts relating to narcotics, marihuana and firearms even though such provisions, like those involved here, also incidentally supplement local policing of activities unlawful under state law. See *United States* v. *Doremus*, 249 U.S. 86; Nigro v. United States, 276 U.S. 332; United States v. Sanchez, 340 U.S. 42; Sonzinsky v. United States, 300 U.S. 506. The only authority cited by name by the court below, United States v. Constantine, 296 U.S. 287, did not involve such incidental regulatory provisions, but held invalid an excise tax imposition of which was conditioned on violation of state law.

ARGUMENT

The Occupational Tax on the Business of Accepting Wagers and the Registration Provisions Thereunder Are Constitutional

The statute here involved imposes an excise tax of 10 per cent on certain types of wagers, the tax

being payable by the persons accepting such wagers (26 U.S.C., Supp. V, 3285), and an annual occupational tax of \$50 payable by those liable for the excise tax and also by persons receiving wagers on behalf of any person so liable (26 U.S.C., Supp. V, 3290). The registration provisions of the act, which according to the court below made it a police measure, provide (26 U.S.C., Supp. V, 3291):

(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A[i.e., the 10 per cent excise tax on wagers], each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

• The question here presented is whether the occupational tax of \$50 and the requirement that taxpayers register their names, addresses and places of business, and the names and addresses of those who act on their behalf or on whose behalf they act are constitutional.

Six district courts have sustained the validity of the statute. *United States* v. *Smith*, No. 22206 (S.D. Cal.), July 3, 1952 (not reported); *United*

States v. Arnold, Jordan, and Wingate, No. 478. (E.D. Va.) September 18, 1952 (not reported); United States v. Forrester, No. 19290 (N.D. Ga.), February 29, 1952 (not reported); United States v. James W. Penn, No. 2021 (M.D. N.C.), May 1952 (not reported); Combs v. Snyder, 101 F. Supp. 531 (D.D.C.), affirmed, 342 U.S. 939. The court below alone has held to the contrary.

A. The Occupational Tax Is A Legitimate Exercise of the Taxing Power

The validity of the occupational tax on the business of wagering is conclusively established by the familiar line of cases sustaining the power of Congress to impose taxes on dealers in narcotics (United States v. Doremus, 249 U.S. 86; Nigro v. United States, 276 U.S. 332), marihuana (United States v. Sanchez, 340 U.S. 42), firearms (Sonzinsky v. United States, 300 U.S. 506), and lotteries (License Tax Cases, 5 Wall. 462). These cases and others (Veazie Bank v. Fenno; 8 Wall. 533 (tax on state bank notes); McCray v. United States, 195 U.S. 27 (tax on oleomargarine)) make it plain that a congressional motive to suppress the activity taxed does not vitiate an otherwise proper exercising of the taxing power of Congress.

The principal difference between the taxes in the cases cited and the taxes imposed on gambling is that Congress believed that the latter would pro-

¹ Copies of the unreported decisions are filed with the Clerk. The Combs decision was based primarily on the doctrine of unclean hands, and the Government's motion to affirm was based on that principle.

duce large revenues.² Both House and Senate Committee Reports estimated that the revenues to be derived from the two gambling taxes together would be \$400,000,000. H. Rep. No. 586, 82d Cong., 1st Sess., p. 54; S. Rep. No. 781, 82d Cong., 1st Sess., p. 112.³ Both Committee Reports stated (H. Rep., p. 55, S. Rep., p. 113):

Commercialized gambling holds the unique position of being a multi-billion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation. Your committee is convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a seminecessity nature are being called upon to bear new or additional tax burdens.

The purpose of the occupational tax was both to collect revenue on its own account and also to facilitate collection of the 10 per cent tax. The Re-

² This in itself is sufficient to distinguish the cases in which this Court has invalidated an alleged tax on the grounds that it was not a true revenue measure but a penalty seeking to regulate matters not legitimately subject to federal control. Cf. Child Labor Tax Case, 259 U.S. 20; Hill v. Wallace, 259 U.S. 44; United States v. Butler, 297 U.S. 1; Carter v. Carter Coal Co., 298 U.S. 238.

³ "The additional revenue it is estimated will be derived from the taxes on gambling in a full year of operation is distributed among the various excises as follows;

ports stated (H. Rep. No. 586, p. 60; S. Rep. No. 781, p. 118):

The committee conceives of the occupational tax as an integral part of any plan for the taxation of wagers and as essential to the collection and enforcement of such a tax.

The eases cited above demonstrate that a federal tax is not invalid because it may be levied on an occupation unlawful under state law. This was first established in the *License Tax Cases*, 5 Wall. 462 (1866). The federal statute required "lottery-ticket dealers" and retail liquor dealers, among others, to pay license taxes which are substantially indistinguishable from the occupational tax here involved. 13 Stat. 252; 14 Stat. 116-117. The defendants in the cases before this Court resided in states in which "selling lottery tickets" and "retailing liquors" were forbidden by state law. 5 Wall, at 463. This was the entire basis for the objection to the federal tax. The Court rejected the argument that the federal statute gave author-

	[In millions]
Occupational tax on coin-operated gam-	
ing devices	\$7
Tax on wagers	400
Occupational tax on the business of ac-	400
	103

With respect to the estimate of \$400 million from the two wagering taxes, since this is a field of taxation with which the Federal Government has had no previous experience and because there is uncertainty as to the actual amount of the tax base, the committee recognizes that it is difficult to estimate too closely the actual revenue which these new taxes will yield."

ity to violate state law, and held (5 Wall. at 474-475):

That the provisions of the acts of Congress requiring such licenses, and imposing penalties for not taking out and paying for them, are not contrary to the Constitution or to public policy.

The opinion elaborated on this point (5 Wall. at . 7, 473):

There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

Since the License Tax Cases, there has been no doubt that federal taxes may be imposed on occupations forbidden by state law. That the income tax applies to such occupations is, of course, well known. Rutkin v. United States, 343 U.S. 130, 137, 140 (dissent). And unquestionably many of the acts taxed by the federal narcotics, liquor and firearms laws are unlawful in some of the states.

⁴E.g., Uniform Narcotic Drug Act, §§ 1 and 2, 9A U.L.A.; Miss. Code (1942) § 2631 (prohibiting manufacture of intoxicating liquor); Oklahoma Statutes (Permanent Ed., 1937) Title 37, § 1 (same); Ill. Stat. (1936) 37.364 (sale of machine guns to general public forbidden); New York Penal Law (Mc-Kinney, 1952) § 1896 (same).

Nothing in the reasoning of the District Court suggests that the occupational tax as such is invalid-although the court somewhat inexplicably dismissed the count of the indictment based on a mere failure to pay the tax. The decision below was based on the theory that Congress was without the right "to also require that certain information be furnished which is peculiarly applicable to the applicant from the standpoint of law enforcement and vice control.", (R. 5.) Particularly objectionable to the Court was the requirement that registrants give names and addresses of other persons with whom they are associated in gambling enterprises. We therefore will now turn to the validity of the registration provisions of the statute.

B. The Registration Provisions of the Statute Are Lawful and Constitutional Means of Facilitating the Collection of the Revenue

That the taxing power permits Congress to implement statutes levying taxes with regulations necessary to the collection of the taxes needs no citation of authority. The *Doremus*, *Nigro*, *Sonzinsky*, and *Sanchez* cases discussed at greater length (*infra*; pp. 21-24) make it perfectly plain that to require a taxpayer to submit to the taxing authorities such basic information as is sought in the statute here involved is an appropriate means of exercising the taxing power.

The incidental effect of such registration provisions on state law enforcement no more invalidates such provisions than the incidental effect of the tax itself invalidates the tax. There is

obviously no clash between federal and state authority when the federal law does not make it harder for the states to enforce the law; appellee's objection is that the federal statute makes it too easy for the states. This Court has many times in the cases cited upheld the validity of incidental regulatory provisions designed to enforce a valid tax, even though such measures also tended to regulate matters primarily within the domain of local law enforcement. Like the present tax on wagering, they sought through systems of excise and special taxes, compulsory registration; and other enforcement devices to supplement local regulation of activities of an antisocial and essentially intrastate character.

1. The registration provisions are necessary to the collection of the wagering taxes

As we have noted, the Committee Reports state that the occupational tax is an "integral part" of the plan for collecting the 10 per cent tax on wagers. The registration provisions are directly related to the enforcement and collection of both taxes. The taxes affect a large and complex business operated by a class of citizens from whom willing compliance and cooperation are not to be expected. It unquestionably facilitates the collection of a tax on a business to have the person engaged in such business specify his name, address and place of business and the names and addresses of the persons either who carry on the business for him or for whom he carries on the business. In-

deed it seems obvious that the taxes could not be collected in the absence of such elementary information.

The particular need for this type of information with relation to the tax on the business of gambling is made clear by the legislative history. of the statute here involved. The Kefauver Committee. whose investigations inspired the instant legislation, found that twenty billion dollars. changes hands every year in the United States as a result of organized gambling (S. Rep. 141, 82d Cong., 1st Sess., p. 13), that gambling is a business that operates through a vast interstate network of syndicates (S. Rep. 141, p. 14, S. Rep. 307, pp. 2-3, 82d Cong., 1st Sess.), and that gamblers customarily fail to keep adequate books and records and so organize their businesses that it is extremely difficult for the Government to determine their individual incomes (S. Rep. 141, pp. 31-33). With respect to the latter problem, the Assistant Comi missioner of Internal Revenue testified before the Committee (S. Rep. 141, supra, p. 31) that:

unlike the gansters of the thirties, many of our modern big-time racketeers take deliberate and carefully contrived steps to defend themselves against the possibility of successful tax prosecutions. * * * They frequently attempt to insulate themselves from direct

⁵ The Reports of the Kefauver Committee, officially designated as the Special Committee to Investigate Organized Crime in Interctate Commerce, appear in Senate Reports Nos. 141, 307, 725, and 2370 of the 82d Congress.

attack by operating through a maze of corporations, dummy stockholders, and "fronts". Under these conditions, investigation on the part of the Bureau aimed at determining whether the returns or supporting records of these individuals are false or fraudulent so as to sustain a charge of criminal tax evasion, is frequently a long, difficult, and time-consuming process. [Italics supplied.]

The registration provisions, which were drafted in the light of this and other similar testimony, sought to minimize evasion of this kind. Both Committee Reports on the bill which later became the present Act, explained the reason for the registration features of the bill as follows (H. Rep. 586, 82d Cong., 1st Sess., p. 60; S. Rep. 781, 82d Cong., 1st Sess., p. 118):

The committee conceives of the occupational tax as an integral part of abyzplan for the tax ation of wagers and as essential to the collection and enforcement of such a tax. Enforcement of a tax on wagers frequently will necessitate the tracing of transactions through complex business relationships, thus requiring the identification of the various steps involved. For this reason, the bill provides that a person who pays the occupational tax must, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers.

It is for Congress to determine the reasonableness of the means employed to effectuate a legitimate exercise of the taxing power. Certainly the registration provisions of the statute here involved are reasonably adapted to the collection of the taxes on wagering.

2. Registration provisions similar to those imposed by the wagering tax statute are found in many taxes and their validity has never been doubted.

There is nothing unusual about the registration provisions contained in the tax on wagering. The Committee Reports demonstrate that these provisions were modeled on similar requirements in other tax laws, many of which have been upheld by this Court. The Reports stated (H. Rep. 586, p. 60; S. Rep. 781, p. 118):

In general, the provisions of the occupational tax follow the pattern of the other occupational taxes imposed under the code and require registration, posting of special tax stamp by the taxpayers, the maintenance by the collector of a list of taxpayers for public inspection, etc.

The registration provisions of the wagering tax require the filing of only names, addresses and places of business. Presumably every tax return requires the taxpayer to state his name and address for purpose of identification. When the tax is imposed upon a business or occupation, the place or

places of husiness must also be set forth. Thus, the taxes on tobacco manufacturers, dealers and peddlers (26 U.S.C. 2011, 2012, 2031, 2032, 2051, 2052, 2071, 2072) require registration of the "name, on style, place of residence, trade, or business, and the place where such trade or business is to be carried on." E.g., Section 2011. A leaf tobacco manufacturer must set forth "where his business is to be carried on, and the exact location of each place where leaf tobacco is held by him on storage." Section 2052. Section 2816 requires the possessor of distilling apparatus to register "the particular place where such still or distilling apparatus is set up * * *, the owner thereof, his place of residence * * *."

The special taxes imposed on oleomargarine, renovated butter, filled cheese, narrotics, marihuana, liquor, firearms, and coin-operated amusement or gaming devices (26 U.S.C. 3200-3268) are supplemented by the general provision that (26 U.S.C. 3270):

Every person engaged in any trade or business on which a special tax is imposed by law shall register with the collector of the district his name or style, place of residence, trade or business, and the place where such trade or business is to be carried on. In case of a firm or company, the names of the several persons constituting the same, and the places of residence, shall be so registered. [Italics supplied.]

⁶ Repealed by 64 Stat. 20 (1950)

Persons subject to the gasoline tax are required to register their "principal place of business". Section 3412(d).

A number of tax statutes contain provisions requiring the taxpayer to submit information as to other persons, not dissimilar to the requirement contained in Section 3291 of the gambling tax law that the taxpayer report the names and addresses of his agents or principal. Thus, the tax on manufacturers of tobacco requires that, in addition to registering his own name, address and place of business the taxpayer shall furnish (26 U.S.C. 2012):

when the same is manufactured by him as agent for any other person, or to be sold and delivered to any other person under a special contract, the name and residence and business or occupation of the person for whom the said article is to be manufactured, or to whom it is to be delivered.

See also 26 U.S.C. 2032; 2072 ("if he sells for other parties, the person for whom he sells").

Section 2810, as we have noted, requires the possessor of a still to register the name and address of the owner. Section 2811 provides that every person who disposes "of any substance of the character used in the manufacture of distilled spirits shall, when required by the Commissioner, render a correct return. * * * showing the names and addresses of the persons to whom such disposition was made, with such details, as to the quantity so

disposed of or other information which the Commissioner may require as to each such disposition, as will enable the Commissioner to determine whether all taxes due with respect to any distilled spirits manufactured from such substances have been paid." Section 2812 requires every person engaged in the business of a distiller or rectifier to give the Collector notice not only of his name, address and the place of business, but also of "the name and residence of every person interested or to be interested in the business." See also the similar requirement for brewers contained in 26 U.S.C. 3155.

Many sections of the Internal Revenue Code require corporations to file the names and addresses of shareholders, e.g., 26 U.S.C. 148 (a), (c), (e) and (f). Marihuana dealers are required to make returns indicating the names of persons from whom, marihuana was received 26 U.S.C. 3233(a), while dealers in firearms are required to remit to the Commissioner of Internal Revenue a copy of the order form identifying the weapon sold and naming and identifying the purchaser. 26 U.S.C. 2723(a) and (b). Brokers must return the names of customers and details as to their transactions. 26 U.S.C. 149. Partnerships must return the names, addresses, and shares of each partner. 26 U.S.C. 187. Persons paying others \$600 or more must report the names and addresses of the recipients. 26 U.S.C., Supp. V, 147.

We have noted that the taxes most akin to the taxes on wagers all have similar registration provisions. The validity of these has uniformly been assumed or upheld.

The statute involved in the *License Tax Cases*, 5 Wall. 462, *supra*, p. 11, required that every person carrying on a business for which a license was required shall register

first, his or their name or style, and in case of a firm or company, the names of the several persons constituting such firm or company, and their places of residence; second, the trade, business, or profession for which a license is desired; third, the place where such trade, business, or profession is to be carried on; * * * [13 Stat. 248-249.]

In upholding the tax on lottery ticket dealers, the Court did not find it necessary to mention this provision—obviously because it did not occur to anyone that such a requirement would be unconstitutional.

The Doremus case (249 U.S. 86) upheld the constitutionality of the Harrison Narcotic Act, Section 1 of which required producers or distributors of opium and other drugs "to register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on". 249 U.S. at 90. Section 2 made it unlawful to transfer the specified narcotic except pursuant to written order forms provided by the Commissioner of Internal Revenue, and made available only to registered dealers (38 Stat. 787). The purpose of the order form pro-

vision clearly was to put a premium on registering as required by section 1, and thereby provide more effective control of the narcotics traffic. The validity of Section 1, which is the equivalent of the provision involved in this case, was not even challenged. The discussion related to Section 2, which contains a much more unusual form of regulation than the mere reporting of the names, addresses and places of business of those engaged in the taxed occupation. The provisions of Section 2 were sustained because

Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. * * * [249 U.S. at 94.]

The Court could not say that these provisions of Section 2 "can have nothing to do with facilitating the collection of the revenue * * *." 249 U.S. at 95.

The *Doremus* decision was reaffirmed nine years later in *Nigro* v. *United States*, 276 U.S. 332, on the ground that the order form provisions are "genuinely calculated to sustain the revenue features" (276 U.S. at 354), even though the effect was to discourage the use of the drugs. Again, although

⁷ The statute was subsequently amended to require only lawfully-entitled dealers to pay the special tax and register. (49 Stat. 1745, 26 U.S.C. 3220.)

Section 1 was discussed in the opinion, its validity, apart from its relation to Section 2, was assumed to be plain. As we have noted, Section 3291 is the equivalent of Section 1; it does not present the problem which caused the Court to divide so sharply as to Section 2. Other provisions of Section 1 had previously been upheld by a unanimous Court, without the need for substantial discussion, in Alston v. United States, 274 U.S. 289, 294.

The Court finally saw fit to mention a provision for registration in *Sonzinsky* v. *United States*, 300 U.S. 506. Section 2 of the National Firearms Act of 1934 (48 Stat. 1236, 1237), required that

* * * every importer, manufacturer, and dealer in firearms shall register with the collector of internal revenue for each district in which such business is to be carried on his name or style, principal place of business, and places of business in such district, and pay a special tax at the following rates * * *.

[Italics supplied.]

The Court disposed of the attack on the registration provision in a single sentence (300 U. S. at 513): "Here Section 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose."

What was "obviously supportable as in aid of a revenue purpose" in the Sonzinsky case is equally

obvious in this case.

The Marihuana Tax Act upheld in *United States* v. Sanchez, 340 U.S. 42, also contained a provision

for registration similar to that here involved. 26 U.S.C. 3231 (a) provides that:

Any person subject to the tax imposed by section 3230 shall, upon payment of such tax, register his name or style and his place or places of business with the collector of the district in which such place or places of business are located.

The Sanchez case involved a suit for taxes due under §2590(a)(2), which imposes a tax of \$100 per ounce on transfers of marihuana to unregistered dealers. The Court, while recognizing that the heavier tax on transfers to unregistered persons implemented "the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels," upheld the Government's claim. Since the particular heavy tax involved was predicated on non-registration as required by §3231(a), the Sanchez case is at least an implicit holding that Congress may require registration of persons subject to taxes of this kind.

United States v. Constantine, 296 U.S. 287, the sole authority relied upon below, is entirely inapposite. It involved a special excise tax of \$1,000 on dealing in liquor, applicable only where the business was conducted in violation of state law. The so-called tax being large in amount and conditioned on commission of a crime, this Court rightly held it to be "a penalty for the violation of state law,

The statute makes the tax payable by the purchaser, unless the transfer is made without an order form, in which event, as in Sanchez, the transferor is liable.

and as such beyond the limits of federal power." However, the instant tax on wagers and the registration provisions attendant thereon, apply irrespective of the legality of gambling under state law. With respect to such a tax this Court observed in the Constantine case itself (296 U. S. at 293):

If it [the tax there involved] was laid to raise revenue its validity is beyond question, notwithstanding the fact that the conduct of the business taxed was in violation of law. The United States has the power to levy excises upon occupations, and to classify them for this purpose; and need look only to the fact of the exercise of the occupation or calling taxed, regardless of whether such exercise is permitted or prohibited by the laws of the United States or by those of a State. The burden of the tax may be imposed alike on the just and the unjust. It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise.

It is thus clear that the Court in the Constantine case would have upheld the kind of tax with which the instant case is concerned.

The gambling tax is a valid exercise of the federal taxing power and its registration provisions are directly and intimately related to the collection of the tax. The fact that the statute may also tend

to suppress unlawful activity does not invalidate it. See *License Tax Cases*, 5 Wall. 462; *McCray* v. *United States*, 195 U.S. 27.

CONCLUSION

It is therefore respectfully submitted that the judgment of the District Court should be reversed.

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NOVEMBER 1952.



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DEC 11 1952

No. 167

In the Supreme Court of the United States

OCTOBER TERM, 1952

United States of America, appellant

JOSEPH KAL MOER

ON APPRAL PROMITER URIVED STATES DISTRICT COURT FOR THE MASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES



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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 167

UNITED STATES OF AMERICA, APPELLANT

o v.

JOSEPH KAHRIGER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

Appellee contends that the statute upon which the information was based "compels a person to be a witness against himself." (R. 3). The court below did not pass upon that contention. United States v. Spector, 343 U. S. 169, 172, and United States v. Curtiss-Wright Corp., 299 U. S. 304, 330, indicate, however, that even though the appeal is under the Criminal Appeals Act, the Court may consider a constitutional issue which is not the basis of the decision appealed from. But cf. United

¹ The other points raised in appellee's brief, pp. 56 to 59, and not discussed in the Government's main brief do not present substantial questions.

States v. Borden Co., 308 U. S. 188; United States v. Beacon Brass Co., decided November 10, 1952.

THE REGISTRATION PROVISIONS OF THE TAX ON WAGERING DO NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION

Although the argument as to self-incrimination seems to have been directed at all of the provisions of the wagering tax law (R. 3), it can relate only to the registration provisions involved in Count II of the information. Count I, which charges appellee with having willfully failed to pay the tax, would not be affected. It is settled that the Fifth Amendment does not make it unconstitutional to tax an unlawful occupation such as gambling. See Rutkin v. United States, 343 U. S. 130, 137, 140 (dissent), and cases cited at p. 9 of the Government's main brief. Accordingly, Count I of the information must be sustained irrespective of how this question may be decided.

We submit that the registration requirements of §3291 clearly do not violate the Fifth Amendment. In the first place, the occupation taxed is unlawful only under state laws, and the federal privilege against self-incrimination protects only against inquiries incriminatory under federal law (pp. 3-13, infra). Secondly, §3291 is not made incriminatory by reason of the existence of the federal statutes prohibiting use of the mails or interstate commerce for the transportation of lottery tickets or related matter. (Pp. 13-24, infra.) And finally we shall argue that the Fifth Amendment does not apply to information required to be filed as an official record when necessary for tax collection purposes any

more than for other legitimate regulatory purposes. (Pp. 24-30, infra).

A. THE CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINA-TION DOES NOT PROTECT AGAINST DISCLOSURE OF VIOLA-TIONS OF STATE LAW.

Section 3290 imposes a tax on the occupation of wagering. Wagering is doubtless unlawful in many states (perhaps in all but Nevada), but it is not forbidden by any federal law.

Thus the registration statement in which the taxpayer is required to set forth his name, address and places of business, and the names and addresses of his agents or principals does not call for a disclosure of information which will reveal a violation of federal law.

It is established that the self-incrimination clause of the Fifth Amendment only relates to information incriminatory under federal law. This principle, for which the decision of a unanimous Court in United States v. Murdock, 284 U. S. 141, is the leading authority, was foreshadowed by earlier cases holding that an immunity statute gives all the protection to which a person is constitutionally entitled if it protects against prosecution by the Government compelling him to testify. Brown v. Walker, 161 U. S. 591, 606; Jack v. Kansas, 199 U. S. 372, 891; Hale v. Henkel, 201 U. S. 43; 68. And the holding in the Murdock case has since been referred to with approval in Feldman v. United States, 322 U. S. 487, 491-492.

Murdock had been summoned by a federal revenue agent to appear before him and disclose the recipients of certain deductions he had claimed in his federal income tax. The record indicated that he had been operating gambling machines in violation of the Illinois gambling laws, and had been paying the amount claimed as a deduction to state officials for permission to do so.² He appeared but refused to make the disclosures, asserting that to do so would incriminate him under state law. This Court, holding that the federal privilege did not extend to protection from state prosecution, said (284 U. S. at 149):

The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, §2. [Italics supplied.]

The passage quoted clearly applies to the case at bar. In both cases a person who may have been violating state gambling laws was asked for information needed to collect a federal tax. Since *Murdock* involved an investigation of the affairs of the witness himself and not merely a general

² See 284 U. S. 142-143, 144; Transcript of Record No. 38, 1931 Term, R. 22-23.

registration requirements, the "setting" was much closer to an incriminating one. Nevertheless in that case, because the investigation "was for federal purposes", not to discover evidence of state crimes, its relation to matters of state law was deemed irrelevant. The same reasoning would apply even more clearly to the general requirement as to the reporting of information needed for the collection of the federal taxes on wagering.

The Murdock opinion continued with the passage quoted approvingly in the Feldman case:

This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. Counselman v. Hitchcock, 142 U.S. 547. Brown v. Walker, 161 U.S. 591, 606. Jack v. Kansas, 199 U.S. 372, 381. Hale v. · Henkel, 201 U.S. 43, 68. [Italics supplied]

The obvious reason why "complete immunity against prosecution by the government compelling the witness to answer" (the Federal government

³ See Hoffman v. United States, 341 U.S. 479, 486, see pp. 20-21, infra.

in that case) was said to be "equivalent to the protection furnished by the rule against compulsory self-incrimination" was that the rule itself protected only against prosecution by that government.

The doctrine of the Murdock case has been given effect in many cases in the Courts of Appeals. United States v. St. Pierre, 128 F. 2d 979, 980 (C.A. 2); Camarota v. United States, 111 F. 2d 243 (C.A. 3), certiorari denied, 311 U.S. 651; Miller v. United States, 95 F. 2d 492 (C.A. 9); Graham v. United States, 99 F. 2d 746 (C.A. 9); United States v. Feldman, 136 F. 2d 394 (C.A. 2).

The continued vitality of the rule of the Murdock case is not the result of adherence to precedent alone. The rule is one expression of the separation between state and federal systems of law that is part and parcel of our federal constitutional system. Thus, this Court in Feldman v. United States, 322 U.S. 487, which held that the Fifth Amendment does not forbid the use in a federal prosecution of testimony previously given in a state proceeding under a state immunity, said (322 U.S. at p. 490):

But for more than one hundred years, ever since Barron v. Baltimore, 7 Pet. 243, one of the settled principles of our Constitution has been that these Amendments [Fourth and Fifth] protect only against invasion of civil liberties by the Government whose conduct they alone limit. Brown v. Walker, 161 U.S. 591, 606; Jack v. Kansas, 199 U.S. 372, 380; Twining v. New Jersey, 211 U.S. 78. Con-

versely, a State cannot by operating within its constitutional power's restrict the operations of the National Government within its sphere. The distinctive operations of the two governments within their respective spheres is basic to our federal constitutional system, howso-ever complicated and difficult the practical accommodations to it may be. * * * [Italics supplied]

And the *Feldman* opinion (at pp. 493-494) referred again to the "principle of [the *Jack*] and later cases as to the separateness in the operation of state and federal criminal laws and state and federal immunity provisions."

⁴ The Feldman case also answers appellee's argument (pp. 61-64) based upon language in earlier decisions as to the unlikelihood of use by one sovereign of information revealed under compulsion to another and the significance of this factor. The last paragraph of the Feldman epinion (322 U.S. at 493-494) states:

Only a word need be said about the phrase of scepticism in Jack v. Kansas, supra, at \$80, that it could hardly be imagined "that such prosecution would be instituted under such circumstances." The "prosecution" and the "circumstances" there referred to were a prosecution on the same facts for violation of the state and the federal anti-trust laws. But see Fox v. Ohio, 5 How. 410, 435; United States v. Lanza, 260 U.S. 377. The cautionary words in Jack v. Kansas in nowise qualified the principle of that and later cases as to the separateness in the operation of state and federal criminal laws and state and federal immunity provisions. There are, as we have already seen, ample safeguards. If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the Byars case, supra, as well as that of McNabb v. United States, 318 U.S. 332, afford adequate resources against such an evasive disregard of the privilege against self-crimination. See United States v. Saline Bank, 1 Pet. 100; United States v. McRae, L. R. 3 Ch. App. 79. Nothing in this record brings either doctrine into play.

One reason why the federal privilege can apply only to federal offenses lies in its relation to the power to obtain testimony by granting immunity. That Congress possesses such power is, of course, well established. But the power of Congress to grant immunity from state prosecution is certainly questionable. The consequence would be that, if the federal constitutional privilege encompassed state offenses, there might often be no way in which the Federal Government could obtain necessary information—and the same obstacle would bar the states in the converse situation. This practical consideration may underlie the immunity cases running from Brown v. Walker to Feldman in their insistence upon keeping the federal and state privileges limited to their own spheres.

In the present context, serious difficulties would be created if an essential enforcement provision in an otherwise unexceptionable taxing measure were invalidated. Federal income tax returns require information which often might disclose violations of state law, as the Murdock case itself illustrates. Any state offense having a pecuniary aspect, from robbery to gambling, could be set up as an excuse for not reporting one's income, or of denying to the Treasury information needed in order to administer the tax laws effectively, if the federal constitutional privilege protected against disclosures of state violations in tax returns. In particular the oft-sustained power of Congress to tax any occupation, irrespective of its legality under state law, would be severely limited or rendered ineffective. See the *Doremus*, Nigro, Sonzinsky, Sanchez, and License Tax cases discussed in the Government's main brief. Moreover, more than the disputed registration requirements are at stake, for a tax could hardly be collected without requiring those subject to it to report at least their names and addresses, and the fact of payment, although this, in itself, could be a link in the chain of incrimination under the state law. Cf. Hoffman v. United States, 341 U. S. 479.

An immediate and significant consequence would be that the existing federal taxes, upheld in the cases cited, on activities illegal in many states would be adversely affected. An important feature of the Marihuana Tax Act is the requirement that every person who imports, manufactures, sells, or deals in marihuana must pay a special tax and register his name and place of business with the collector of the district in which his business is carried on (26 U.S.C. 3230(a)(5), 3231). 26 U.S.C. 3236 makes this information available to the public, including presumably, state law enforcement officers.

Wagering, excise
Wagering, special
Adulterated and process or renovated butter, and filled cheese
Narcotics, including marihuana and special taxes
Firearms transfer and occupational taxes

\$4,371,869
973,197
3,501
28,201

⁵ In connection with appellee's contention that the Wagering Tax Act is not a revenue measure, the following comparison with the sums collected under other taxes, the validity of which has been sustained, may be pertinent (Summary of Internal Revenue Collections, released by Bureau of Internal Revenue October 3, 1952):

The Uniform Narcotic Drug Act has been adopted in most states and territories of the United States. Section 2 of the Act makes it unlawful for any person to manufacture, possess, sell, etc., any narcotic drug, except for certain medicinal and other purposes authorized by the Act. Section. 1(14) defines "narcotic drug" as including cannabis, or marihuana, which in Section 1(13) is defined as it is in the Marihuana Tax Act, supra.6 With slight variations in the definition of marihuana employed, \38 states and territories have adopted the Act in a form that prohibits manufacture, sale, etc. of marihuana. Similarly, the National Firearms Act, which requires persons who deal in machine guns, "sawed off" shotguns, and silencers (26 U.S.C. 3261 (a)), and those who own such weapons (3261(b)), to register with the collector of the district in which they reside, would be jeopardized. Under the laws of many states it is unlawful to possess or to deal in weapons of the type comprehended by the Act,8 so that registration

The original definition used in the Uniform Narcotic Drug Act was modified to conform with that of the federal act. See 1942 Commissioners' Comments, Uniform Narcotic Drug Act, §1, 9A U.I.A.

⁷ These are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming. Statutory Notes, Uniform Narcotic Drug Act, §1, 9A U.L.A.

⁸ Delaware (sale or possession of silencers prohibited, Laws of 1937, c. 212); Iowa (sale of silencers and possession of machine guns prohibited, Code 1946 §§ 695.18, 696.1; Massa-

either as a dealer in or an owner of firearms as defined in the statute would expose one to local prosecution. Were appellee's contention to be accepted that federal constitutional privileges would be violated by requiring one engaged in an enterprise unlawful under state law to register, then these provisions, implicitly approved by this Court in the Sanchez and Sonzinsky cases, would fall.

In addition, the federal revenue from excise taxes on the manufacture of distilled spirits would be jeopardized. (26 U.S. C. 2800(1).) Every person engaged in the business of distilling is required to give notice of that fact to the collector of the district in which the business is carried on, giving his name, his address, the names and addresses of others in the firm, and the precise location of the business. (26 U.S. C. 2812.) In states where it

chusetts (possessing machine guns and sawed-off shotguns, sale of silencers forbidden, Laws 1932, c. 269 § 10, Supp. 1951, c. 269, § 10A); Minnesota (selling or possessing sflencers forbidden, Stat. 1947, § 615.11); Mississippi (manufacture, sale, and possession of silencers forbidden, Code 1942, §2376); Missouri (sale and possession of machine guns to and by general public prohibited, Revised Stats. 1939, §4819); Nebraska (sale of machine guns except to law officer prohibited, Revised Statutes 1943, §28-1010; possession of same unlawful, §28-1011; New Jersey (sale of machine guns unlawful, Statutes 1939,. §2-176-50; manufacture, sale, etc., of silencer forbidden, §2-176-14); New York (sale of machine guns to public prohibited, Penal Law (McKinney, 1952) §1896); North Carolina (sale of machine guns unlawful, with limited exceptions, General Statutes 1943, §14-409); North Dakota (use and sale of silencers prohibited, Revised Code 1943, §62-0401); South . Carolina (possession, sale, etc., of firearms to general public, unlawful, Code, 1942, §1258-1); Vermont (manufacture, sale, and use of silencers forbidden, Statutes 1947, § 8281),

is unlawful to manufacture distilled spirits, such registration would clearly be incriminatory, and, on appellee's theory, unconstitutional. Furthermore, a very real difficulty would arise with regard to distillers in all states who are operating without complying with local regulatory provisions. They might also claim that the filing of the reports required for the federal tax would serve to incriminate them under state law. Nevertheless, in United States v. Constanting, 296 U.S. 287, where the defendant had in fact paid the annual tax of \$25 on dealing in liquor, "despite the fact that he was violating local law in prosecuting his business" (296 U.S. at 294), this Court made it plain that the sole doubt was as to the validity of the added \$1000 tax which was conditioned on violation of state law.

Thus, it is clear that to allow the possibility of incrimination under state law to excuse registration under a valid federal tax statute, contrary to the import of the doctrine of the *Murdock* case, would have far-reaching consequences. Not only would registration features crucial to enforcement be eliminated where the activity taxed is unlawful under state law, but there would be a question as to the power of Congress to tax such activities at

Oklahoma Statutes (1937) Title 37, §1 makes it a misdemeanor to manufacture, sell, or otherwise furnish any liquor

containing more than 3.2 per cent of alcohol.

² Mississippi Code (1942) § 2631 makes manufacturing any "vinous, malt, spirituous, or intoxicating liquor or drink which if drunk to excess will produce intoxication" a felony, punishable by one to three years' imprisonment.

all since payment of the tax would itself be incriminating. Moreover, an attempt by Congress to avoid losing all revenues from activities unlawful in only some states by exempting those states from the effect of the tax would probably be doomed because the Constitution requires that excises be imposed uniformly throughout the United States (Art. I, Sec. 8). See Downer v. Bidwell, 182 U. S. 244; Fernandez v. Wiener, 326 U. S. 340, 359.

B. THE WAGERING TAXES AND REGISTRATION PROVISIONS DO NOT REQUIRE INCRIMINATION UNDER THE FEDERAL LOT-TERY ACTS.

Appellee argues in his brief (p. 64) that the registration provisions of the present Act compel him to give testimony incriminatory under federal as well as state law, citing the federal lottery laws, 18 U. S. C. 1301, 1302, which prohibit interstate commerce in lottery tickets and the use of the mails to distribute lottery tickets and other documents pertaining to lotteries.

1. Registration as required by this statute does not signify that the registrant is necessarily engaged in running a lottery, nor, a fortiori, does it indicate that he is violating the Federal Lottery Acts.

It is to be noted that the wagering taxes must be paid by many persons who do not violate the lottery laws. In the first place, the taxes on wagering

¹⁰ If a federal excise limited to the states where the activity taxed was lawful were held not to conflict with the uniformity provision, the door would be opened for state legislatures to seek to immunize residence of their states from federal excises by declaring the activities unlawful without any bona fide intention of bringing prosecution.

apply to many transactions which are not lotteries. For wagering is defined as meaning:

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit. [26 U. S. C. (Supp. V) 3285(b)(1).]

"Lottery" is then defined to include "the numbers-game, policy, and similar types of wagering", but to exclude games of a type usually played in the presence of all the parties, and drawings conducted by and for the benefit of charitable organizations. 26 U. S. C. (Supp. V) 3285 (b) (2).

Wagering in lotteries is thus only one of three types of gambling transactions covered by the taxes on wagers. Persons covered by Class A, which includes book-making on horse races, would not be engaged in a lottery.¹¹ The many persons subject

three elements are necessary: prize, consideration, and chance. Eastman v. Armstrong-Byrd Music Co., 212 Fed. 662 (C.A. 8); National Conference on Legalizing Lotteries, Inc. v. Farley, 96 F. 2d 861 (C.A. D.C.). The first two elements are present in wagering on sports events, but the third, chance, has been held to be absent since the wagerer's success depends upon "the exercise of knowledge, skill and judgment" rather than "the operation of artificial forces which characterize schemes based upon 'lot or chance,' as used in the lottery statute." United States v. Rich, 90 F. Supp. 624, 630 (E.D. Ill.) (bookmaking on the outcome of horse racing, baseball, elections, and other events of uncertain outcome); cf. Forte v. United States, 83 F. 2d 612 (C.A. D.C.) (numbers scheme based on race results held a lottery because it did not involve direct betting on

to the wagering tax because of transactions other than lotteries could not possibly be incriminating themselves under the lottery laws by filing the registration statement.

In the second place, persons conducting lotteries may not be using the mails or interstate commerce. The reports of the Kefauver Committee indicate that although book-making was conducted on an interstate basis through the use of wire services,12 this was not true of the policy or numbers game, which is a form of lottery. In Philadelphia the numbers game was described "as operated in the main by local characters" (S. Rep. 307, 82d Cong., 1st sess., at 49). The description of the numbers game in Chicago, which may we'll be typical, reveals that the betting is handled by hundreds of low paid employees and so-called commission writers, some of whom go "from door to door" (id., at 56). The hand-to-hand transmission of number slips may in part be the result of efforts to avoid violating the federal lottery laws by not sending anything through interstate commerce or the mails. The Kefauver Committee so suggested with respect to

horse races). The preponderance of state authority holds that betting on sports events is not a lottery. Commonwealth v. Kentucky Jockey Club, 238 Ky. 739, 38 S. W. 2d 987; People v. Reilly, 50 Mich. 384, 15 N. W. 520; People ex rel. Lawrence v. Fallon, 152 N. Y. 12 46 N. E. 296; People v. Lyttle, 251 N.Y. 347, 167 N. E. 466. See Pickett, Contests and the Lottery Laws, 45 Harv. L. Rev. 1196, 1216 (1932), where the author says with regard to betting on horse races: "It is usually held that no lottery is involved, although there may be an infraction of statutes prohibiting betting."

 ¹² S. Rep. 141, 82d Cong., 1st sess., pp. 10-25; S. Rep. 307, 82d Cong., 1st sess., p. 53.

the "Treasury balance lottery racket", which it described as "another interstate gambling empire of impressive proportions, which has grown up in defiance of the old lottery law by decentralizing its operations and attenuating its interstate ties". S. Rep. 725, 82d Cong., 1st sess., p. 89.

It thus appears that the two principal types of gambling discussed by the Committee will generally not be in violation of the lottery laws, because book-making is not regarded as a lottery and because the persons engaged in the policy or numbers games often deliberately avoid trouble with the Federal Government by not using interstate commerce or the mails.

The present significance of these facts is that the many persons subject to the wagering taxes, who for the above reasons do not violate the lottery laws, would not be incriminating themselves under those laws by filing the registration statements required for the wagering taxes. It thus cannot be said that on its face registration would be incriminating under the federal statutes. At most, this would be so for those wagering taxpayers who engaged in lotteries through interstate commerce or the mails—and this may well be a small proportion of the persons subject to the wagering taxes.¹³

2. The privilege must be claimed as to particular questions; it does not excuse failure to file a return or registration statement. Since many persons subject to the wagering tax will not have rea-

¹³ We know of no accurate statistics as to these matters.

son to fear the Federal lottery laws, there is good reason for subjecting such taxpayers to the same requirement as other witnesses, namely that they must claim their privilege if they do not wish to give the incriminating information. As this Court recently stated in *Rogers* v. *United States*, 340 U.S. 367, 370-371:

If petitioner desired the protection of the privilege against self-incrimination, she was required to claim it. *United States* v. *Monia*, 317 U.S. 424, £27 (1943). The privilege "is deemed waived unless invoked." *United States* v. *Murdock*, 284 U.S. 141, 148 (1931).¹⁴

See also Vajtauer v. Commissioner, 273 U.S. 103, 112; Smith v. United States, 337 U.S. 137, 147.

by income tax returns. Such returns provide for disclosure, inter alia, of the sources of one's income. Disclosure of sources might well be incriminating as to some taxpayers if they were engaged in activity forbidden by federal law, such as receiving bribes or robbing banks. But this does not mean that anyone can avoid filing a return. If an answer will be incriminating as to a particular taxpayer, he must claim his privilege as to that. He cannot refuse to file any return at all.

¹⁴ The dissent did not challenge this principle.

¹⁵ In this portion of the argument we are assuming that the privilege against self-incrimination applies to tax returns to the same extent as to the examination of a witness in court or before a grand jury, although we argue below that it does not. See pp. 19-30, infra.

United States v. Sullivan, 274 U.S. 259, is directly in point. Defendant was convicted of refusing to file an income tax return. It was assumed that his income "was derived from business in violation of the National Prohibition Act" (p. 263). The Court held that he could be punished for not filing a return even if he were entitled to withhold information, a point which the Court found it unnecessary to decide. The opinion of Mr. Justice Holmes states (274 U.S. at 263-4):

As the defendant's income was taxed, the statute of course required a return. See United States v. Sischo, 262 U.S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might. have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any

word upon the government blank would bring him into danger of the law. Mason v. United States, 244 U. S. 362. United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103. In this case the defendant did not even make a declaration, he simply abstained from making a return. [Italics supplied.]

In Count II of the information in the instant case ¹⁶ taxpayer is charged with having failed to register for the occupational tax on wagering. Since what is called "registration" is in fact merely the filing of a statement containing information as to names, addresses, and places of business, failure to register is the equivalent of failure to file a return under other taxes. If appellee believed some of the questions on the registration form (R. 9) to be incriminating under federal law in so far as he was concerned, he could "have raised the objection in the return [registration statement], but could not on that account refuse to make any return [statement] at all" (Sullivan, at p. 263), just as in the Sullivan case.

3. The "link in the chain" test of self-incrimination should not be as rigidly applied to registration and reporting requirements of the federal revenue laws as to other types of inquiries. As has been pointed out, the information which a registrant must furnish would certainly not be directly in-

¹⁶ As has been pointed out, *supra*, p. 2, appellee's argument based on the privilege against self-incrimination would have no application to Count I.

criminating under the lottery Acts, which are the only federal statutes upon which appellee relies. We do not believe that the constitutional privilege precludes requiring a taxpayer to provide such information. Cf. Greenberg v. United States, 343 U.S. 918.

It is no doubt true that if a person were engaging in a lottery and using the mails or interstate commerce in so doing, the disclosure of his places of business and employees could be said to furnish a "link in the chain of evidence" necessary to prosecution. Hoffman v. United States, 341 U.S. 479, 486; Patricia Blau v. United States, 340 U.S. 2 159; Greenberg v. United States, supra. But those cases and the principles for which they stand must be read in their context—that of grand jury investigations into the very matters as to which the witnesses were questioned. If tax reports are restricted at all by the self-incrimination clause of the Fifth Amendment (but see pp. 24-30, infra), they should not be subjected to as stringent a limitation as is questioning in the course of an inquiry likely to lead to prosecution.

Thus even though it may be assumed that the "link in the chain" principle would be applicable, the *Hoffman* case makes it clear that "the setting in which [the question] is asked", the "background" and the "peculiarities" of the particular case are important in determining whether a claim of privilege is far-fetched or reasonable. 341 U.S. at 486-7. In the *Hoffman* case, the witness' refusal to answer questions relating to his occupation was

upheld because in the circumstances of that case, it appeared that the witness had 'reasonable cause to apprehend danger from a direct answer" 341 U.S. at 486, citing Mason v. United States, 244 U.S. The witness, who had a twenty-year 362, 365. police record, was one of twenty notorious racketeers subpoenaed to appear before a grand jury called expressly to investigate "the gamut of all crimes covered by federal statute." 341 U.S. at In such a setting, the witness might justifiably feel that he was the target for future prosecution under federal narcotics, internal revenue, white slavery, or other laws, particularly as he had already served a sentence on a narcotic charge. 341 U.S. at 489.

Consequently, questions which in other surroundings might be thought to be innocuous and to have only a tenuous connection with a possible federal offense could reasonably be thought to be incriminating. One who is required to register pursuant to the federal revenue laws is not in a comparable situation. He is not before an antagonistic prosecutor and a hostile grand jury with power to bring him to trial. He has not been singled out and publicized as a probable law-violator, but on the contrary is one of a large group, few of whom are likely to have violated the narrowly drawn and strictly construed ¹⁷ federal lottery provisions.

Such information, when sought in order to make

¹⁷ France v. United States, 164 U.S. 676; Francis v. United States, 188 U.S. 375; United States v. Halseth, 342 U.S. 277.

possible collection of a valid tax, is not given in a setting which makes the danger of prosecution for violation of the federal lottery laws reasonably likely—even if the same question in a grand jury investigation might be barred.

If the "link in the chain" test which is applied to questions to witnesses in an investigation or trial were applicable as strictly to tax returns, the result would be that no one engaged in, or receiving income from, or claiming a deduction because of, a possibly illegal activity could be required to report. anything which might afford a prosecutor a helpful clue—which means he would not be required to report as to such income at all. For even to report an amount of income not identified as coming from a lawful occupation could aid a prosecutor seeking to establish that a taxpayer was engaged in a particular unlawful one. The statements of a taxpaver's address in an ordinary tax return could have a similar effect. The same would be even more clearly true of the ordinary questions as to the source of income, or the nature of a business from which profit is derived, or as to information returns such as accompany the payment of withholding taxes on employees, which require the disclosure of the employees' identities. If persons could avoid reporting any information as to such matters-address, amount, occupation, source of income, recipient of deduction—on the ground of a possible link to an unlawful activity, the tax return would be of no value. This would in practical effect make it impossible to collect taxes from such

persons, or at least to collect taxes which would bear any relation to the amount for which the persons were liable.

And yet it is well established that income from gambling, as well as from other unlawful occupations, must be reported for federal income tax purposes.18 The cases sustaining the authority of Congress to impose taxes on occupations illegal under federal law are especially significant in this connection. It was held in a number of cases that persons engaged in selling liquor during the period of national prohibition were still required to pay the federal taxes on the forbidden traffic. United States v. Stafoff, 260 U.S. 477, 480; United States v. One Ford Coupe, 272 U.S. 321, 327; United States v. Sullivan, 274 U.S. 259, 263. The very fact of paying a tax which was collectible only from persons engaged in an unlawful activity might be directly incriminating, far more so than is the information sought here. For payment could be regarded as an admission of guilt, not merely a clue to possible guilt. The decisions per-

v. United States, 343 U.S. 130, 137, 140; Johnson v. United States, 318 U.S. 189 (money paid to political leader as protection against police interference); United States v. Sullivan, 274 U.S. 259 (illicit traffic in liquor); Humphreys v. Commissioner, 125 F. 2d 340 (C.A. 7) (protection payments to racketeer and ransom paid to kidnaper); Chadick v. United States, 77 F. 2d 961 (C.A. 5) (graft); United States v. Commerford, 64 F. 2d 28 (C.A. 2) (bribés); Patterson v. Anderson, 20 F. Supp. 799 (S.D. N.Y.) (unlawful insurance policies); Petit v. Commissioner, 10 T. C. 1253 (black market gains); Droge v. Commissioner, 35 B.T.A. 829 (lotteries); Rickard v. Commissioner, 15 B.T.A. 316 (illegal prize fight pictures); Mckenna v. Commissioner, 1 B.T.A. 326 (race track bookmaking).

mitting taxation of such activities must mean that the forced disclosure in a tax return of information necessary to the collection of the tax does not violate the Fifth Amendment—for otherwise the decisions would be meaningless. These cases would support the reporting requirement of the tax on wagers even if the information sought were much more directly incriminating than it is.

C. THE PRIVILEGE AGAINST SELF-INCRIMINATION HAS NO APPLICATION TO INFORMATION REQUIRED TO BE FILED IN CONNECTION WITH THE COLLECTION OF TAXES.

In what has been said above we do not mean to suggest that the filing of the information required in the registration statement would be constitutionally privileged at all. A tax return which is reasonably adapted to the enforcement of a tax is a record required by law to be kept, and no more protected by the privilege than the records required to be kept for regulatory purposes in Shapiro v. United States, 335 U. S. 1. This must at least be so when the required report or return does not call for information which is incriminating on its face.

1. As long ago as Boyd v. United States, 116 U.S. 616, this Court indicated that records required to be kept for inspection under the revenue laws were not protected by the Fourth Amendment, and presumably also not by the Fifth. See 116 U.S. at 623-624. This principle was applied to other

officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures."

records required to be kept by regulatory statutes in Wilson v. United States, 221 U. S. 361, Davis v. United States, 328 U. S. 582, and most recently in Shapiro v. United States, 335 U. S. 1. In the Shapiro case, the Court held that a licensee under O. P. A. price regulations could be compelled to disclose records which the O. P. A. required him to keep, even though such records might tend to incriminate him of violating the price control laws. The opinion stated (335 U. S. at 32-33):

Q It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped a would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator. * * * Accordingly, the principle enunciated in the Wilson case, and reaffirmed as recently as the Davis case, is clearly applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation

and the enforcement of restrictions validly established."

In the Shapiro case, the base activity was prescribing commodity prices in a war emergency. It was not questioned that Congress had power to undertake such regulation, nor that the record-keeping requirement of the Price Control Act was a legitimate exercise of that power. In the present case, the taxing power of Congress is involved. It is clear that Congress may, in the exercise of that power, impose occupational and excise taxes as was done here. As we have shown in our main brief (pp. 21-24), this Court has many times affirmed the power of Congress to enact registration and other provisions needed to enforce a tax validly imposed.

It would be inconsistent with the tenor of the Shapiro and Wilson cases, supra, to permit the Fifth Amendment to excuse one from transmitting information essential to the "enforcement of restrictions validly established." 221 U.S. at 380. There is no reason why this is any the less true for reports or records required under the taxing power than under the war or commerce powers. To the contrary, as the Boyd case indicates, the use of such incidental authority in the collection of taxes has been historically recognized without any thought that the compulsory reporting of information needed to collect taxes violated the Fifth Amendment. That the doctrine is applicable to income tax returns was indicated, although not

decided, in the unanimous opinion in the Sullivan case, wherein the Coart stated (274 U.S. at 263-264):

It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.²⁰

It would seem to be equally extravagant to permit the Fifth Amendment to prohibit enforcement of a different, but equally valid, federal tax.

2. The privilege against self-incrimination is also not applicable because the registration statement required by the tax on wagers does not require disclosure of unlawful activities. The tax applies in futuro. No person need engage in the business of accepting wagers following enactment of the present statute. If he elects to remain in the business, he does so with full knowledge that the

²⁰ For an able discussion of the interrelations of the Shapiro and Sullivan cases, see Meltzer, Required Records, the McCarran Act, and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687, 715-719. The author concludes (p 717): "If the questions left open by the Sullivan case are resolved in the light of the purposes underlying the required-records doctrine, it seems likely that tax records will be given no more protection than records required by the O.P.A. It is true that the court in the Shapiro case spoke in terms of records required for regulatory purposes and that this language could be seized upon as a basis for distinguishing tax records and excluding them from the operation of the required-records doctrine. This distinction, however, lacks substance * * * It would be paradoxical for the Court, after having removed the privilege from records required as an incident of a regulatory program-in order. to facilitate enforcement-to stop short where revenue records are involved."

federal government has imposed a tax on this occupation and that persons subject to the tax are required to submit information incidental to its collection. He cannot elect to continue in the business and reject the restrictions which Congress has placed upon it. He is put in the position of having to report information as to his business only because he chooses to place himself in that situation.

A very similar problem confronted the Court of Appeals of New York in E. Fougera & Co. Inc. v. Gily of New York, 224 N. Y. 269, 120 N. E. 642. A city ordinance required dealers in patent medicines to register the names of ingredients for which therapeutic effects were claimed with the Department of Health. It was stipulated by the parties that the objective of the ordinance was to secure information on which to base prosecutions for violations of law. 224 N. Y., at 278. To the contention that this ordinance violated the plaintiff's privilege against self-incrimination, the court, per Cardozo, J., replied (p. 279):

The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. He is simply notified of the conditions upon which he may do business in the future. He makes his own choice. To such a situation, the privilege against self-accusation has no just application. [Italies supplied.]

The same theory has been advanced by Wigmore ²¹ in a section of his treatise "cited with approval by the opinion of the Court" ²² in *Davis* v. *United States*, 328 U.S. 582, 590, and quoted at length in *Shapiro* v. *United States*, 335 U.S. 1, 35n, as follows:

The State requires the books to be kept, but it does not require the officer to commit the If in the course of committing the crime he makes entries, the criminality of the entries exists by his own choice and election, not by compulsion of law. The State announced its requirement to keep the books long before there was any crime; so that the entry was made by reason of a command or compulsion which was directed to the class of entries in general, and not to this specific act. The duty or compulsion to disclose the books existed generically, and prior to the specific act; hence the compulsion is not directed to the crimina get, but is independent of it, and cannot be attributed to it. . . . The same reasoning applies to records required by law to be kept by a citizen not being a public official, e.g., a druggist's report of liquor sales, or a pawnbroker's record of pledges. The only difference here is that the duty arises not from the person's general official status, but from the specific statute limited to a particular class of acts. The duty, or compulsion, is directed as before, to the generic class of acts, not to the

²¹ 8 Wigmore, Evidence (3d ed.) 1940, Sec. 2259c.

²² The quotation is from Shapiro v. United States, 335 U.S. ± 1, 35n.

criminal act, and is anterior to and independent of the crime; the crime being due to the party's own election, made subsequent to the origin of the duty. [Italics as in the original.]

These principles are as applicable to a lawful tax as to a regulatory statute. A taxpayer is not required to engage in the business taxed. If he does so after passage of the taxing legislation, he must accept the conditions which Congress has imposed upon anyone who engages in such an enterprise. In the language of the then Judge Cardozo "He is simply notified of the condition upon which he may do business in the future. He makes his own choice. To such a situation the privilege against self-incrimination has no just application."

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DECEMBER 1952.



LIBRARY SUPREME COURT, U.S.

DEC 3 1952

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IN THE

Supreme Court of the United States

October Term, 1952.

No. 167.

UNITED STATES OF AMERICA,
Appellant,

V.

JOSEPH KAHRIGER.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Brief for Appellee

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12367-12368
Borden, The Effect of Dual Sovereignty on the Privilege Against Self-Incrimination, 26 Temple L. Q. 64 (1952)
Davis, Official Notice, 62 Harv. L. Rev. 537 (1949) 19
Ency. Brittanica, Vol. 3 (1950)
Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 529 (1947)
Hearings of the Subcommittee of the Committee of Appropriations of the House of Representatives, Treasury-Post Office Departments Appropriations for 1953, 82nd Cong., 2nd sess., Wed., Jan. 23, 1952
Hearings before the Subcommittee of the Committee of Appropriations, U. S. Senate, Treasury-Post Office Departments Appropriations for 1953, 82nd
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Miami Herald, Wed., Nov. 19, 1952, P. 1-D66,	67.
New York Herald Tribune, Sun., Jan. 6, 1952, p. 1 cont'd. on p. 20	65
New York Times, Sept. 6, 1951, p. 51, col. 6	35
Note, The Presumption of Constitutionality Reconsidered, 36 Col. L. Rev. 283 (1936)	54 -
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The American Racing Manual (1952)	39



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 167.

UNITED STATES OF AMERICA,
Appellant,

V.

JOSEPH KAHRIGER.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the District Court (R, 3-7) is reported in 105 F. Supp. 302.

JURISDICTION.

The order of the District Court dismissing the information was entered May 7, 1952 (R. 7). A notice of appeal was filed on June 5, 1952 (R. 7). On October 13, 1952, this Court noted probable jurisdiction (R. 19). The jurisdiction of this Court is conferred by 18 U. S. C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED.

Whether the occupational tax provisions of the Revenue Act of 1951 and the regulations issued thereunder which levy a tax of \$50 per year on persons engaged in the business of accepting taxable wagers and require such persons to register by filing an information return with the Collector of Internal Revenue, open to public inspection, prescribe criminal penalties for engaging in such business without registration or payment of tax, but which exclude from tax and registration: persons who accept wagers who do not make it their business; persons engaged in games in which "usually" (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made in the presence of all persons placing wagers in such game; and persons engaged in the business of accepting wagers who conduct a parimutuel wagering enterprise licensed under State law, are unconstitutional because: (a) they are solely intended to penalize illegal gambling in the various States under the pretense of exercise of the Federal Tax power, in violation of the Tenth Amendment; and (b) they are so confiscatory, vague and indefinite, arbitrary and self-incriminatory as to violate the Fifth Amendment.

Constitutional Provisions, Statutes and Regulations Involved.

1. The Fifth Amendment provides, inter alia, that-

No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

2. The Tenth Amendment provides, that-

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. Section 471(a) of the Revenue Act of 1951 (c. 521, Title IV, 65 Stat. 529) (referred to in Brief as Wagering Act), provides, inter alia:

SUBCHAPTER A-TAX ON WAGERS.

[26 U. S. C., Supp. V, 3285].

- (a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.
 - (b) Definitions. For the purposes of this chapier-
 - (1) The term "wager' means (A) any wager with a respect to a sports event or a contest placed with a

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person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term, "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

(e) Exclusions from Tax. No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

[26 U. S. C., Supp. V, 3287]

Certain provisions made applicable.

All provisions of law, including penalties, applicable

with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable.

SUBCHAPTER B-OCCUPATIONAL TAX.

[26 U. S. C., Supp. V, 3290].

Tax. A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

[26 U. S. C., Supp. V, 3291].

Registration. (a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

- (1) his name and place of residence;
- (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and
- (3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.
- (b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. * * * * 126 U. S. C., Supp. V. 32921.

Certain provisions made applicable.

Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply.

[26 U. S. C., Supp. V, 3293]

Posting.

Every person liable for special tax under this subchapter shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request; to any officer or employee of the Bureau of Internal Revenue. • • • [26 U. S. C., Supp. V, 3294].

Penalties.

- (a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000.
- (b) Failure to post or exhibit stamp. Any person who, through negligence, fails to comply with section

3293, shall be liable to a penalty of \$50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of \$100, and the cost of prosecution.

(c) Willful violations. The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter. * * *

SUBCHAPTER C-MISCELLANEOUS PROVISIONS. [26 U. S. C., Supp. V, 3297].

Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

[26 U.S. C., Supp. V, 3298].

Inspection of books.

Notwithstanding section 3631, the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter. * * * (26 C. F. R. 325.21(b));

Regulation: "A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an in-

dividual may be primarily engaged in business as a salesman and also for the purpose of the tax be engaged in the business of accepting wagers."

STATEMENT.

On March 17, 1952, a two-count information was filed in the United States District Court for the Eastern District of Pennsylvania charging that defendant, being in the business of accepting wagers, as defined in 26 U. S. C. 3285, supra (1), failed to pay the occupational tax of \$50 per year as required by 26 U. S. C. 3290, supra, and failed to register with the collector of his district as required by 26 U. S. C. 3291, supra, in violation of 26 U. S. C. 2707(b), and 3294, supra (R. 2).

The defendant moved to dismiss the information on the ground that the statute on which it is based is unconstitutional in that it constitutes a penalty in the guise of a tax; that it is arbitrary and unreasonable; that it attempts to regulate an activity which is entirely within the jurisdiction of the state; that it imposes a tax which is not uniform, in that certain persons are excluded from its operations; and that it compels a person to be a witness against himself (R. 3).

Additional reasons assigned in the Briefs filed in the lower court and argued were that the statute is vague and indefinite; that the statute violates the Due Process Clause of the Fifth Amendment (R. 4).

In its opinion granting defendant's motion to dismiss, the District Court stated:

"* * In addressing ourselves to the above question we find it necessary to consult the many decisions sub-

mitted to us by the parties and those suggested by our own research. * * But it seems to us that the case which most clearly reveals the silver thread of truth as contained in the decisions is to be found in the case of the *United States v. Constantine*, 296 U. S. 287, decided by the United States Supreme Court on December the 9th, 1935." (R. 5)

The court below then quoted in part from the opinion of Justice Roberts in that case (R. 5-7), and stated:

"No language that we could use would more clearly or more forcefully express the law of the land on this subject. In addition to being the pronouncement of the Supreme Court of the land on the principle involved, and by which we are bound, we find ourselves in full accord with it, both in letter and in spirit" (R. 7).

SUMMARY OF ARGUMENT.

The Wagering Act is an attempt by Congress to penalize intrastate crime, specifically illegal gambling, solely by means of the tax power under Article I, Section 8. Congressional debates reveal that Congress was aware that they could not tax illegal gambling in the States under the decisions of this Court, interpreting the Tenth Amendment: United States v. Constantine, 296 U. S. 287; United States v. Butler, 297 U. S. 1; Linder v. United States, 268 U. S. 5.

Therefore, a Wagering Act was cleverly written which according to its sponsors in Congress pretended to tax all gambling, legal as well as illegal, but in fact by means of a system of exclusions and definitions exempted practically all legal gambling in the States. In order to relieve persons who were engaged in gambling in Nevada from taxation, where practically all forms of gambling are permitted under a State license, a unique definition of wagering was adopted that excluded from the provisions of the Wagering Act the bulk of the legalized gambling in that State, namely card games, poker, blackjack, roulette games, dice games and various types of gambling wheels. Wagers made by charitable organizations were also excluded from the tax as well as "friendly" types of wagers, vaguely defined by regulation, and wagers made by persons not engaged in the practice of making wagers.

In addition to the confiscatory tax levy, 10% of the gross income, each person who engaged in illegal gambling had to register and pay a special occupational tax of \$50 for himself as well as for all his employees and fill out a special form, 11-C (R. 9), in order to obtain a tax stamp without which it was unlawful to operate the gambling business. These information returns were filed with the Collector of Internal Revenue of the district where the business was operated. The returns were available for public inspection and were, in fact, published by the Collector in the newspapers.

The Commissioner of Internal Revenue, in testifying before the Senate Finance Committee, had advised against the adoption of the Wagering Act. In his opinion, it was not a revenue measure.

The Kefauver committee, which had investigated crime and whose disclosures, according to the Government, had inspired this legislation, did not recommend this Act. They

vigorous'y opposed it and the Congressional debates make it clear that the members of that committee believed that persons engaged in gambling in the various States would go underground since compliance with the Act was impossible and that very little, if any, revenue would be obtained. They also questioned its constitutionality, citing United States v. Constantine, supra. The Kefauver committee proposed certain amendments to the Bill which in their opinion would have obtained revenue from those engaged in gambling.

Senator George, Chairman of the Senate Finance Committee, attacked the recommendations of the Kefauver committee contending inter alia that one of the basic recommendations was unconstitutional because its purpose was to punish an offense. The recommendations of the Kefauver committee were defeated and the Wagering Act was passed. The revenue obtained for the fiscal year ending June 30, 1952, was \$4,615,196.42.

The effect of furnishing the information required by Form 11-C was to compel the registrant to admit violating the laws of the State where the business was operated, thus subjecting the registrant to definite criminal prosecutions by the local and probably by Federal authorities. The public listing of gamblers by the Government was naturally not conducive to the continued operation of the business. Requiring persons to incriminate themselves in order to continue in business clearly discloses that revenue was not the purpose of this legislation, but police regulations designed to eliminate local gambling.

It truly can be said that any resemblance between this Wagering Act and a revenue measure is purely co-incidental.

ARGUMENT.

Introductory.

Essential to a critical analysis of the constitutional validity of any statute is an understanding of the problems which gave rise to its enactment. The Wagering Act was the result of the publicized investigations of the Special Committee to Investigate Organized Crime in Interstate Commerce, popularly known as the Kefauver Committee.

Judge Goodman in United States v. Nadler, 105 F. Supp. 918, 919 (N. D. Cal. 1952), remarked;

"All those who can see and read know that Congress after investigations in 1950 and 1951, determined to do something about the 'wagering evil' and its attendant racketeering activities. We need not speculate about the Congressional motives concerning these matters. They are too obvious. (Footnote.) The investigations of the Senate's Special Committee to Investigate Organized Crime in Interstate Commerce (so-called Kefauver Committee) were too vividly reported via radio and television to be soon forgotten. Congress adopted the wagering statutes October 20, 1951."

And the Government in its Brief stated:

"The particular need for this type of information with relation to the tax on the business of gambling is made clear by the legislative history of the statute here involved. The Kefauver Committee, whose investigations inspired the instant legislation, * * *" (U. S. Br. 15).

What has been generally overlooked is that the Wagering Act was passed over the vigorous protests of Senator Kefauver and the members of his Committee.

Senator Kefauver stated (97 Cong. Rec. 12231-12233):

"MR. KEFAUVER: Mr. President, the amendment is affered on behalf of the members of the former Senate Crime Investigation Committee. I think it is important first to examine part VI of the bill, which has to do with wagering.

This provision provides for a special tax of 10 percent of the amounts bet in an organized lottery, where the people are not all present at the time the lottery is operated. It provides also for a tax of 10 percent of the amount which may be bet with bookmakers, provided, however, that if a bookmaker lays off any part of a bet with a so-called lay-off man, he may claim credit for the amount, so laid off, and the person to whom it is laid off will have to pay the tax. The interpretation and explanation would apply to the policy business or the numbers racket which is prevalent in so many large cities.

The bill also provides for an occupational tax of \$50 for each person who is engaged in wagering. That means that any person who is operating a lottery or any person who is engaged in the numbers business or who may be an agent operating for someone else, will have to pay an occupational tax of \$50 in order to carry of his business. It is calculated that this tax would raise \$400,000,000 a year.

I wish to show—and the other members of the committee foin with me in the idea—that this tax would not raise such an amount of revenue. If the laws against gambling are strictly enforced, and if the income tax laws are amended, as we propose in the substitute amendment, a great deal more money will be recovered that way. Moreover, a great deal more money will be forced into the legitimate channels of commerce, where

the State and Federal Governments will receive taxation. [Italics supplied.]

I realize that the Committee on Finance has been hard put to find methods of raising revenue. However, it is our opinion that this is the wrong approach, and that the ill results would be much worse than would be justified by the amount of revenue which might result from the amendment.

MR. KERR: Mr. President, will the Senator yield for a question?

MR. KEFAUVER: Let me speak for a few minutes, and then I shall be glad to yield.

The proposal to impose a tax on wagering is morally offensive. It cannot be enforced, and it will not raise a substantial amount of revenue. It will drive bookies underground, and will discourage local and State officials from enforcing their laws against gambling.

Let it be pointed out that this provision does not apply to the operators of casinos. It does not apply to roulette, organized club games, and other type of gambling. It applies only to the three specified types of gambling.

First. A Federal tax such as proposed in this measure would put the stamp of United States Government approval on gambling outlawed in 47 out of 48 States. It is true that the United States has never made a distinction between taxing sources of income—whether legal or illegal. But what we are asked to do here is to impose a special levy on gambling applicable to professional gamblers and paid by them. It is far different from merely saying to all taxpayers—whatever their incomes and whatever their occupations—that they must pay a tax on all their earnings equally—whether obtained from their labor, dividends, gifts, or their ill-gotten gains: * * *

I ask, what is the purpose of this tax? If it is to raise revenue—and I will show later that the Federal Government would collect far less than estimated—why not tax the gambling casinos which still flourish in our great cities, the organized crap games, roulette, draw poker, blackjack, noncharity bingos, and other games that mulct our people of huge sums each year? And why stop at gambling? Why not tax the profits of other organized criminal activities such as prostitution, moon-shining, narcotics trade, and extortion and shake-down rackets?

But if the purpose is to suppress gambling, root out the racketeers, curb crime, and expose corruption, let us attack the problem directly. The Crime Investigating Committee has made many legislative recommendations for dealing with organized gambling and other criminal activities. These proposals—which have been carefully drawn after many months of hearings—place upon the local communities the final responsibility for ridding themselves of gangster elements. Let us not attempt to use the Federal tax authority to do a job which it cannot do and is not designed to do. Let us not convert the Internal Revenue Bureau into a crime-control agency.

We cannot have successful law enforcement unless the local people have the responsibility. This provision would put a veritable army of tax men into the local law enforcement field, in everybody's back yard, and change our traditional method of law enforcement, which places the primary responsibility upon the local people. * * *

Second. The 10-percent gambling tax cannot be effectively enforced. Traditionally under our system, payment of taxes has been voluntary. The Bureau of

Internal Revenue relies largely upon the cooperation of citizens for compliance with the tax regulations. The method of collecting the gambling tax would follow the same pattern if the plan proposed, requiring books to be kept, were followed. If forms are sent to the tax-payers and they do not put in the proper information, the forms can be sent back, or they can be required to furnish full statistics. But it is another thing to send a veritable army of internal revenue agents into every city in the country, when such agents are not available and try to track down a particular bookie, who is operating on a transitory basis, in order to try to collect a tax from him.

Under this proposal, bookmakers and the numbers operators, their agents and runners would register with the Internal Revenue Bureau and pay an occupational tax of \$50 a year. As part of his registration, a professional gambler would have to identify those persons receiving wagers on his behalf and in addition disclose the i entity of those persons for whom he may be acting as agent. * * *

Enforcement will be one of the most formidable tasks ever undertaken by Internal Revenue Bureau. It will require thousands of adents trained in criminal investigation to bring out compliance and collection of taxes. (Italics supplied.)

Mr. Dunlap, the newly appointed Commissioner of Internal Revenue, appeared before the committee, and I made inquiry of some Treasury officials. They are not prepared to enforce this tax. If they are not able to enforce it, as will be the case, they will be held up to ridicule, and thus there will be a lessening of respect for this great department of our Government. Furthermore, they will be blamed for the continuation of this type of gambling.

Enforcement will be one of the most formidable tasks ever undertaken by the Internal Revenue Bureau. As I said, it will require thousands of agents trained in criminal investigation to bring about compliance and collection of taxes. It may involve tracing hundreds of transactions, through dummy corporations, agents, subagents, and runners, and penetrating the hundreds of artful devices to conceal the identity of those liable for payment.

In brief, the registration requirements and the tax will drive the bookies underground. * * *

I think that the Treasury experience with the collection of income taxes from the gamblers and racketeers belies any hope that the Government will get considerable revenues from this source.

The Treasury each year is defrauded of huge sums of money in taxes by those engaged in organized gambling activities. Their returns, for the most part, are fraudulent; their incomes are grossly understated. The amount of tax they pay has no relation to their gross earnings or taxable income. * * *

As the Wall Street Journal said, if ever there was a plan to burn down city hall to get rid of rats, this is it. • • •

I do not approve particularly of a slot-machine tax, but there is quite a difference between a special tax on an instrument like a slot machine and a tax on a method of life or doing business. It would be interpreted as giving a sanction to the methods of gamblers, and it would discourage local law-enforcement officers. Furthermore it would pass the responsibility for enforcement onto the Federal Government, and the Federal Government would not get any substantial amount of money, certainly not so much money as would be

provided by the amendments which are offered in the nature of a substitute.

What are the amendments? First, we have found that many persons operating gambling casinos charge off good will. In Florida it is called ice. It is the payment which is made to enforcement officers. In California it is called operating expenses. They charge off a tremendous amount. Of course, they keep their books dishonestly, in the first place. So the first amendment would prevent the charging off of expenses paid or incurred as a result of illegal wagering.

The last part of the amendment provides that if during a given year anyone earns more than \$10,000 on an illegal transaction or in an unlawful trade or business; he must file a statement of net worth with his incometax return.

In many editorials in many of the outstanding newspapers, such as the Wall Street Journal and the Washington Star, and in many editorials in magazines the position is taken that a refusal by Congress to adopt the amendment we are proposing would constitute an invasion of the field of law enforcement and would be a discouragement to enforcement officers.

Furthermore, Mr. President, every one of the amendments contained in the substitute was considered by the American Bar Association's Commission on Organized Crime. That commission is headed by Judge Robert Patterson, an outstanding lawyer; and either other distinguished members of the American Bar Association serve on the commission. They unanimously recommend every one of the amendments contained in the substitute. It was submitted to the house of delegates of the American Bar Association, at the meeting last week

in New York; and each of the amendments was approved by the members of the house of delegates.

Mr. President, I ask unanimous consent to have printed in the RECORD at this point the findings of the special committee of the American Bar Association which were approved by the house of delegates of that association, approving the four items which were submitted today as a substitute, and which will be offered again tomorrow."

The amendments offered by Senator Kefauver for himself and other Senators were rejected by a vote of 49 to 29, 18 not voting.

I.

The Wagering Act on its face is an attempt to penalize illegal intrastate gambling under the pretense of exercising the Federal tax power—the Act is not a Revenue measure.

The statute is nothing but an attempt to regulate or impose the Congressional will in a field in which Congress has no regulatory power, namely, illegal gambling in the States, in violation of the Tenth Amendment of the Constitution.

No psychoanalyst is needed to discover the motives of Congress in passing this Wagering Statute. The obvious and inevitable effect of the statute is crystal clear. There is certainly no doubt of the actual effect of the statute (Appellee's Br. 1A-45A).

¹ Davis, Official Notice 62 Harv. L. Rev. 537, 556 (1949); Quong Wing Kirkendall, 223 U. S. 59, 64 (1912).

To get the right answer we must first put the right question. The Appellant's statement of the question presented in this case (U. S. Br. 2)(is simply a truism. Of course, a revenue measure is not unconstitutional because of "incidental regulatory features". We concede that a Federal excise tax does not cease to be valid merely because it regulates, discourages on ever deters the activities taxed and even though the revenue obtained is negligible; and that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax tends to restrict or suppress the thing taxed and that in such a case it is not within the province of courts to inquire into the unexpressed purpose or motives which may have moved Congress to exercise a power constitutionally conferred upon it. Fernandez v. Wiener, 326 U.S. 340, 362 (1945); United States v. Sanchez, 340 U. S. 42 (1950).

But this case is quite different. This statute's sole purpose is to penalize only illegal gambling in the States through the guise of a tax measure. This is forbidden by the Constitution. The Constitution does not confer upon Congress any police power. United States v. Keller, 213 U. S. 138, 148 (1909).

In United States v. Butler, 297 U. S. 1, 69, 70 (1936), this Court stated:

"The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resorts to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. Gibbons v. Ogden, 9 Wheat: 1, 199, 6 L. Ed. 23, 70. * * *

in the Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U.S. 20, 66 L. Ed. 817, 42 S. Ct. 449, 21 A. L. R. 1432, and in Hill v. Wallace, 259 U. S. 44, 66 L. Ed. 822, 42 S. Ct. 453, this Court had before it statutes which purported to be taxing measures. But their purpose was found to be to regulate the conduct of manufacturing and trading, not in interstate commerce, but in the States,-matters not within any power conferred upon Congress by the Constitutionand the levy of the tax a means to force compliance. The court held this was not a constitutional use, but an unconstitutional abuse of the power to tax. In Linder v. United States, 268 U. S. 5, 69 L. Ed. 819, 45 S. Ct. 446, 39 A. L. R. 229, supra, we held that the power to tax could not justify the regulation of the practice of a profession under the pretext of raising revenue. United States v. Constantine (decided December 9, 1935) (296 U. S. 287, ante, 233, 56 S. Ct. 233), we declared that Congress could not, in the guise of a tax, impose sanctions for violation of state law respecting the local sale of liquor. *

All powers granted by the Constitution are subject to the fundamental qualification that the federal nature of our government must be maintained. The possibility that particular legislation might impair the dual system of government, which it was the purpose of the Constitution to preserve, has been adverted to by this Court as a reason for holding it invalid.

Chief Justice Marshall declared in a much-quoted paragraph in McCullough v. Maryland, 4 Wheat. 316, 423 (1819):

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of execut-

ing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Again in Linder w. United States, 268 U. S. 5, 17 (1925), this Court stated:

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress, ostensibly enacted under power granted by the constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the States, is invalid, and cannot be enforced."

The test is not whether the purposes or ends which it is sought to accomplish are achieved, but whether, however achieved, they are the kind of purposes or ends which have been entrusted to the Federal Government. Were any other test applied we should have a centralized, not a federal, system.

In construing an Act of Congress with a view to determining its constitutionality, it is necessary for the Court to consider its natural and reasonable effect. In Collins v. New Hampshire, 171 U. S. 30 (1898), this Court held invalid a State statute making it a crime to sell oleomargarine that had not been artificially colored pink. There was nothing in the statute itself to show that the purpose of the legislature in passing it was to prohibit sales of oleomargarine. But looking at the natural and reasonable effect of the stat-

ute, the Court found that to color oleomargarine pink would render it unsalable and therefore held that the statute, although in the form of a regulation, was in fact a prohibition. The court stated (pages 33, 34):

"If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

Attempts have been made by Congress to accomplish something not within the powers delegated to the United States by casting the law in the form of a revenue statute. But whenever a federal excise tax was in substance a police regulation so obviously unrelated to any fiscal or national need as to be outside the Federal taxing power, it was held invalid. Charles C. Steward Machine Co. v. Davis, 301 U. S. 548, 591 (1937), citing United States v. Constantine, 296 U. S. 287. The broad aspect of this question is stated in note 5 to the opinion in Railroad Retirement Board v. Alton Railroad Co., 295 U. S. 330 (1935):

"When the question is whether the Congress has properly exercised a granted power the inquiry is whether the means adopted bear any reasonable relation to the ostensible exertion of the power. Mugler v. Kansas, 123 U. S. 623, 661; Hammer v. Dagenhart, 249 U. S. 251, 276; Bailey v. Drexel Furniture Co., 259 U. S. 20, 27."

The Government contends that:

"The principal difference between the taxes in the cases cited and the taxes imposed on gambling is that Congress believed that the latter would produce large revenues. (Footnote.) This in itself is sufficient to distinguish the cases in which this Court has invalidated an alleged tax on the grounds that it was not a true revenue measure but a penalty seeking to regulate matters not legitimately subject to Federal control. Both House and Senate Committee Reports estimated that the revenue to be derived from the two gambling taxes together would be \$400,000,000" (U. S. Br. 9, 10).

But even where the title of an "Act" states that one of the purposes of the Act is to raise revenue this does not prove that it is a revenue measure. Other acts, not revenue measures, have expressed such a purpose. Child Labor Tax Case, 259 U. S. 20; University of Illinois v. United States, 289 U. S. 48 (1933).

This Court said in Nigro v. United States, 276 U. S. 332, 353 (1928):

"Congress by merely calling an act a taxing act cannot make it a legitimate exercise of taxing power under Sec. 8 of Article I of the Federal Constitution, if, in fact, the words of the act show clearly its real purpose as otherwise."

Nor does the fact that the Act has raised large sums of money prove it to be a revenue measure. Thus in the Head Money Cases, 112 U. S. 580 (1884), the provision of an "Act to regulate immigration, requiring ship owners to pay a duty on each passenger coming to any port within the United States from a foreign port," was deemed not to impose a tax.

In United States v. Butler, 297 U. S. 1 (1936), the title of the Act read: "An act * * * to raise revenue for extraordinary expenses * * *" but this did not prove that the act must be treated as a revenue measure.

Furthermore, the Congressional debates reveal that the committee's estimate² was based on a misunderstanding (97 Cong. Rec. 12241):

"MR. KERR: * * * As I understand, the Senator's estimate—and if I am in error about it, I want him to correct me—is that those activities amount to between \$17,000,000,000 and \$30,000,000,000 annually. Mr. President, a 10-percent tax on those activities would amount, not merely to \$400,000,000 but to anywhere from \$1,500,000,000 to \$3,000,000,000. That is what such a tax would yield. That estimate is based upon the statement the Senator from Tennessee himself made in reference to the extent of those operations.

MR. KEFAUVER: Mr. President, will the Senator

from Oklahoma yield?

THE PRESIDING OFFICER (MP. SMITH of North Carolina in the chair): Does the Senator from Oklahoma yield to the Senator from Tennessee?

MR. KERR: I yield for a question.

MR. KEFAUVER: I wish to point out to the Senator from Oklahoma, in the first place, that that estimate was an estimate of the over-all amount of gambling. Of course this bill does not relate to the second most lucrative kind of gambling, namely, that at casinos, including crap games and roulette. [Italics supplied.]

MR. KERR: Mr. President, the junior Senator from

² In the period between November 1, 1951, and the end of the fiscal year June 30, 1952, the stamp tax collections amounted to \$606,561.08. The amount of the excise tax collections (10% tax on wagers) amounted to \$4,615,196.42. (Figures supplied by Commissioner of Internal Revenue.)

Tennessee is correct in his statement of what is included. But when he appeared before the Finance Committee, I, myself, asked him how much gambling would be affected by this bill; and he said that his estimate was between \$17,000,000,000 and \$30,000,000,000.

MR. KEFAUVER: I understood that the Senator from Oklahoma was asking what was the over-all amount of illegal gambling. However, that is aside from the point.

What I have been trying to make clear to the Senator is that such a provision would not produce anything, and therefore we wish to have it eliminated, so that the money will be used for other purposes, in legitimate channels of commerce." (Italics supplied.)

The problem of determining when a tax is not a tax may at times be difficult—the issue is one of form against substance—but if the condition of the imposition is the commission of a crime, the exaction large (10% on the gross income), applies in effect only to wagers illegal by State law, the registration provisions expose the registrant to local prosecution, and wagering that is legal in the states exempt from taxation, what masquerades as a tax is clearly a penalty. The purpose of a penalty is to compel obedience to the law, not to obtain revenue—though it may in fact produce revenue.

As to motive, it was stated in the Constantine case:

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the o state may decree for the violation of a state law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State."

This is the instant case.

The Wagering Act should be read in its entirety to understand its design, not just a single section; but the government disregarded the first part of the Act, namely Subchapter A (Appellee's Br. 3, 4). For the purposes of this case the most significant features are the "wagers" not taxed, the persons who need not register and pay the \$50 occupational tax.

Section 3290 imposes the special tax of \$50 per year only on a person who is liable for the tax under Subchapter A or who is engaged in receiving wagers for or on behalf of any persons so liable. The pertinent regulation defining the scope of this tax is:

"A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting

³ Justice Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 529, 537.

⁴ The exemption from taxation of "friendly" wagers introduces a strange theory in federal taxation—a tax depending whether the person who does something make a "practice" of doing it. A true excise tax is one that is levied whenever the transaction to be taxed occurs.

wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman and also for the purpose of the tax be engaged in the business of accepting wagers" (26 C. F. R. 325.21(b)). (Italics supplied.)

The government argues that:

"United States v. Constantine, 206 U. S. 287, the sole authority relied upon below, is entirely inapposite. It involved a special excise tax of \$1,000 on dealing in liquor, applicable only where the business was conducted in violation of state law. The so-called tax being large in amount and conditioned on commission of acrime, this Court rightly held it to be 'a penalty for the violation of state law, and as such beyond the limits of federal power'. However, the instant tax on wagers and the registration provisions attendant thereon, apply irrespective of the legality of gambling under state law" (U. S. Br. 24, 25). (Italics supplied.)

This is a gross oversimplification. It fails to recognize that this Act was so drawn that practically only those engaged in wagering of the type for which they could be prosecuted in the various states were placed within a special occupational category, compelled to register and pay taxes

^{5 &}quot;Section 461 of your committee's bill adds a new chapter 27A to the code which imposes a 10-percent excise tax upon wagers of certain types, principally those placed with bookmakers and lottery operators, and a \$50 per year occupational tax both upon persons engaged in accepting such wagers and upon persons who receive wagers for the person so engaged. This is the same as the provision contained in the House bill." (Extract from S. Report No. 781, 82d Cong., 1st Sess., p. 112, September 18, 1951.)

on their occupation and wagers; but that persons engaged in wagering of the type for which they could not be prosecuted in the various states because they were licensed, and persons engaged in the many types of wagering that were legal in one state were, by a strange definition, relieved from liability of federal taxation and registration.

In the Constantine case, this Court pointed out that the \$1,000 excise tax was forty times as great as the annual tax of \$25 imposed upon all persons who were engaged in the business of a retail dealer in malt liquors. The Court there stated (p. 295):

"* * * The so-called excise of \$1,000 is forty times as great. It is ten times as great as the annual tax under Rev. Stat. Sect. 3244 for wholesale liquor dealers and brewers, and fifty times as great as that imposed upon dealers in malt liquors. If the imposts under Rev. Stat. Section 3244 were fixed in amount in accordance with the importance of the business or supposed ability to pay, the exaction in question is highly exorbitant. This fact points in the direction of a penalty rather than a tax."

Under this Wagering Act, essentially all wagering legal in the States is exempt from all taxes. But persons engaged in types of wagering that are illegal in the States must register and pay the \$50 occupational tax and ten percent of each wager.

There are two classes of wagering in the States, legal and illegal. In 47 out of 48 states, wagering, as defined in the Act, is illegal, that is, one cannot obtain a license to engage in the business of accepting wagers which are taxable under the Act with the exception of those engaged in

pari-mutuel wagering enterprises licensed by the State, which are not taxed under the Act.

In other words, one engaged in the business of accepting wagers as defined in this Act must violate the state law in order to engage in that business in 47 of the 48 states. In the 48th state, Nevada, where wagering or gambling as it is usually called, is legalized, Senator McCarran of that state was concerned with the effect of the Wagering Act upon the licensed gambling activities in his State and asked some pertinent questions (97 Cong. Rec. 12239):

"MR. McCARRAN: I merely desire to ask the Senator from Colorado whether in his judgment the House language deals with illegal gambling and does not affect licensed gambling when a sovereign state has licensed it.

MR. JOHNSON of Colorado: Of course the Supreme Court decisions require that in the collection of taxes no distinction be made between legal and illegal gambling.

MR. McCARRAN: If the Senator takes that position I assume he is taking the position we are going to legalize gambling out of business.

MR. JOHNSON of Colorado: No; that is not the position of the Senator from Colorado at all. I want to make a statement in reply to the Senator from Nevada at that point.

MR. McCARRAN: If that be the position which I never understood it to be—certainly I must do everything in my power to defeat that part of the bill.

There are 24 states at present that have laws that permit parimutuel enterprises for wagering, if licensed by the state (Appellee's Br. 37A, 38A). This Court takes judicial notice of the public laws of each state. New York Indians v. United States, 170 U. S. 1, 32.

MR. JOHNSON of Colorado: That is not the position. I shall read a statement which sets forth the effect of the proposed wagering tax on legalized gambling:

'EFFECT OF PROPOSED WAGERING TAX ON LEGALIZED GAMBLING

The wagering taxes provided by the bill are imposed without regard to the legality or illegality of gambling under the laws of any particular State. For this reason the proposed taxes have been criticized as being destructive of the revenue now being derived by the State of Nevada from legalized gambling. In this connection it should be emphasized that the gambling taxes provided by the bill are imposed principally upon wagering with bookmakers and the so-called numbers operators. It is believed that these latter forms of gambling furnish only an extremely small part of the revenue which the State of Nevada derives from gambling generally. The bulk of the legalized gambling in the State involves the operation of slot machines, which are specifically exempt from the wagering tax imposed by the bill, and from casino-type games, such as cards and dice, which are likewise not within the scope of the proposed tax. This is because the bill, in effect, exempts in general games involving player participation. In order to make this completely clear, the committee report specifies that within the scope of this exclusion are card games such as draw poker, stud poker, and blackjack, roulette games, dice games such as craps, bingo, and keno games, and the gambling wheels frequently encountered at country fairs and charity bazaars. It is likewise made clear that this listing is not intended to be exclusive, and that any other games of similar types would also be excluded. Because it is believed that the State of Nevada derives its principal gambling revenues from the operation of these excluded games, the proposed wagering tax should have only minor, if any, effects on the overall revenue of that State. Furthermore, since bookmakers and numbers operators should in most cases be able to pass the new tax on to the bettors, it seems likely that any revenues which the State of Nevada may derive from these two sources will not in any way be affected."

The grave concern that Senator Johnson of Colorado, a member of the Finance Committee, expressed concerning the effect of the proposed wagering tax upon the revenue of Nevada is very revealing in interpreting this Wagering Act.

In the State of Nevada, the 48th State, the effect of having to register and pay a 10% tax on wagers reduced the number of licenses issued to bookmakers from 26 to 5 (Appellee's Br. 39A). It is obvious, if in the only state where it is legal to pursue the business of a bookmaker the licenses issued dropped from 26 to 5, what the effect must be in the 47 states where it is illegal to pursue such an occupation.

Congress knew that legally no distinction in taxes could be made between legal and illegal gambling. Therefore a statute was written which does just that by clever legal craftsmanship.

If, to repeat, in 47 out of 48 states, wagering is illegal unless conducted by means of a state license, and a Federal revenue statute is passed that excludes from taxes and registration those who have state licenses, and drawings conducted by charitable organizations, and in the 48th state where wagering is legal, the definition of wagering is so bizarrely drawn that practically all of the wagering trans-

actions in that state are exempt from federal registration and taxation; then the conclusion is inevitable as it was in the Constantine case that the exaction "is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a state law." (R. 6, 7).

If this statute is sustained it is impossible to conceive how any statute labeled a taxing measure and passed by Congress to penalize a local business, legal or illegal, or a particular group of people, and not to obtain revenue, may be declared invalid. Cf. Trusler v. Crooks, 269 U. S. 475 (1926).

For example, suppose Congress desired to prohibit persons from operating automobiles who do not have drivers' licenses. A revenue statute, similar to the Wagering Act, might be passed levying the sum of \$10 upon every operator of an automobile. This would be a reasonable excise tax. The statute would also provide that one must register with the Collector of Internal Revenue on a form open to public inspection, but if one had a state license to operate an automobile he would be exempt from federal tax and registration. Could anyone contend this would be a revenue measure or simply a method of bringing the authority of the Federal Government to penalize and prosecute persons for driving automobiles without having state licenses?

This is exactly what we have here. If one is engaged in the wagering business, as defined in this Act, he must first register by filing an information return with the Collector of Internal Revenue of the district where the business is lo-

⁷ And we may have more such "revenue" measures passed to regulate local crime: a tax on carrying on the business of a burglar, or a robber or a tenement house unless one is licensed by the state, in which event no tax would be levied or registration required. A determination whether a local crime had been committed would have to be eventually decided by the Federal courts. Cf. dissenting opinion Rutkin v. United States, 343 U. S. 130, 137 (1952).

cated before he secured a tax stamp without which it would be illegal to operate (R. 10, see Par. 4 of 11-C).

The information furnished on the return reveals the number of employees or agents engaged in the business of receiving wagers, and the true name and residence of every such person. Every person engaged in the business of accepting wagers and liable to the 10% excise tax imposed by Section 3285 of the Internal Revenue Code and every person engaged in receiving wagers for or on behalf of any person so liable must file a return on Form 11-C. Not only the employer, but each employee must pay a special tax of \$50 a year. The information return is filed with the Collector and the names and addresses of those who have obtained wagering tax stamps are made public (R. 15).

If one is engaged in selling liquor, marihuana, or operating slot machines, or stills, an information return is also required in order to obtain a tax stamp, but only the employer need file a return and pay a tax. He need not state the names and address of his employees, nor are they required to pay a tax (Appellee's Br. 27A-34A). Nor are they exempt from registration and taxes if licensed by the State.

An illegal wagering business might openly continue to exist and produce revenue for the United States Treasury on the sole condition that all the state and local law enforcement officials would refuse to enforce the local laws. To require one who is engaged in any business, but especially one that is illegal, to make public his employees, his modus operandi, is simply to make it impossible to carry on such a business if he complies with the Act, and Congress knew it. It is Prohibition all over again without the blessings of an Amendment.

Not only do committee reports and statements of committee members or the sponsors of legislation carry weight but remarks made during the course of legislative debates reflect the general legislative understanding. Federal Trade Commission v. Raladam Co., 283 U. S. 643, 650-651 (1931); Humphrey's Executor v. United States, 295 U. S. 602, 625 (1935); United States v. St. Paul M. & M. R. Co., 247 U. S. 310, 318 (1918).

The Senate Finance Committee considering H. R. 4473 (Internal Revenue Act of 1951) heard Commissioner of Internal Revenue John B. Dunlap before a closed meeting held on Sept. 5, 1951. He testified as to the cost of the enforcement of the measure, the amount of revenue that might be expected to be derived from it, and the difficulty of collecting the tax, and advised against its adoption (N. Y. Times, Sept. 6, 1951, p. 51, col. 6). He later confirmed his opposition to the bill and disclosed the tenor of his previous testimony when appearing before both the House and Senate Committees on Appropriation in an attempt to get appropriations for the enforcement of the Act for the subsequent year:

"We are confronted in the Bureau of Internal Revenue with a type of task we have never had before, that is, we must prove, before these people will admit liability for this tax, that they are in a certain line of business which makes them subject to the tax. * * *

In many cases that we know of, where a man has taken out these stamps, the local authorities have descended right on his place of business and have investigated them and, in many instances, arrested him for violating the gambling statutes, whatever they might be in that community. In fact, in one community the other day, the police brought a man in and the judge held that the mere fact that he purchased his stamp was conclusive evidence that he was a gambler and convicted him accordingly.

That is the angle I brought up before the committees last year. I mean, last summer, when they were considering it. I told them at that time—I don't mind telling you—that if I were in the gambling business, I would be reluctant to walk into the internal revenue collector's office and pay \$50 for the privilege of having my name turned over to the chief of police. I don't think I would do it and they are not going to do it.

Of course, in my opinion, and it is my opinion, it is not primarily a taxing statute." Hearings of the Subcommittee of the Committee of Appropriations of the House of Representatives, Treasury-Post Office Departments Appropriations for 1953, 82nd Cong., 2nd Sess., Wed., Jan. 23, 1952, pp. 424, 426, 427.

"In other words, as I said before the Finance Committee, I do not believe people are going to continue to come in voluntarily and pay this \$50 tax, when it is merely paying for the privilege of having your name turned over to the chief of police. * * *

It places this responsibility on the internal revenue service which it has never had before. We have to go out and prove that some individual is in a certain line of business. If he is not in that line of business he is not liable for the tax. That becomes criminal investigative work and requires the employment of a criminal type investigator. * * *

It may be that the law was intended to eliminate gambling in this country. If such is the case I cannot consider it, and never considered it, a true revenue measure." Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, Treasury-Post Office Departments Appropriations for 1953, 82nd Cong., 2nd Session, pp. 444, 445, Tues., Feb. 26, 1952.

Commissioner Dunlap also told the Senate and House Appropriations Committee that he expected the additional cost of collection to be \$20,686,591, and as of the time of his testimony his department had collected only \$583,125 (Hearings, supra, House, p. 423, Senate, p. 443). He went on to testify that if lucky, the return would barely cover costs—a dollar for a dollar, rather than the \$38 for \$1 you get in the case of an internal revenue agent (Hearings, House, p. 426, Senate, p. 445).

The Special Committee to Investigate Organized Crime in Interstate Commerce, unlike the Finance Committee, did not recommend this wagering statute. On the contrary, they vigorously opposed it (S. Rep. No. 725, 82nd Cong., 1st Sess., pp. 9, 93):

"The Internal Revenue Code has been analyzed with a view to tightening controls over organized crime through the Federal taxing powers. The. Committee is not persuaded that the direct imposition of taxes, as exemplified by the Harrison Narcotics Act, is a suitable general device for curbing illegal activities, and for this reason, it has rejected numerous proposals to impose direct, confiscatory taxes on various types of organized criminal enterprises. There is force in the argument that recognizing gangsters and hoodlums directly for tax purposes tends to compromise the dignity of the federal Government and to complicate local enforcement problems. Moreover, the direct, confiscatory tax might be subject to grave questions on constitutional grounds (see U. S. v. Constantine, 296 U. S. 297, 1935)."

The Crime Committee was more familiar with the problem of tax evasion by those engaged in illegal enterprises than

the Senate Finance Committee. Yet their recommendations were utterly disregarded. Senator Kefauver stated dufing the Senate debate (97 Cong Rec 12362):

"Mr. President, if the tax, which is proposed in the bill, remains in the measure, and apparently it will, it applies only to bookies, lotteries and number runners. 'It does not apply to casinos, to roulette wheels, dice games and all the other vicious forms of gambling. So the only thing such people are going to do is get out of gambling and into other activities to which the law does not apply. Unless we can prevent them from charging off their expenses of operation, their good will and many other items they have been getting by with, and cheating the United States Government out of millions of dollars, the Government will lose a great deal of revenue and be defrauded by commercialized gambling, which is going to be on the increase in the line. of casinos, roulette games, crap games and all such things which are not taxed by the pending bill."

The Senate debate reveals that Senator Kefauver had correctly prophecized when he stated that the effect of this statute will be to drive people who are engaged in the business of making wagers as defined under the statute underground (Arbellee's Br. 47A-57A). If revenue was the purpose of this wagering statute, substantial revenue could have been obtained from wagers placed in parimutuel enterprises which are licensed under state law and wagering games carried on in gambling casinos or other similar establishments.⁸ But they were not taxed. The Senate Re-

^{8 &}quot;The experience of other countries where the method of collection is either by means of the totalizator or the pari-mutuel indicates that taxation in this form will yield a satisfactory return." Ency. Brittanica, Vol. 3 (1950) at page 486.

port gave reasons (S. Rep. 781, 82nd Cong., 1st Sess., p. 116). The reason for not taxing the wagers place in parimutuel wagering enterprises licensed under state law was:

"Such wagering is presently subject to state and, in some instances, local taxation and to superimpose a federal tax upon these transactions would only serve to maintain the existing advantage which bookmakers enjoy over pari-mutuel betting by reason of their immunity from pari-mutuel taxes."

This is an admission that the purpose of the Act was not to obtain revenue but to eliminate the alleged existing advantages that bookmakers enjoy over licensed operators—by eliminating bookmakers—through taxing and exposing them to prosecution by local authorities.

Parimutuel wagering enterprises were very profitable in the years before this wagering statute was passed and since November 1, 1951 these enterprises have had astounding increases (Appellant's Br. 240A-45A). See also the American Racing Manual (1952). The reason given by the Committee offends common sense.

"Common understanding and experience are the touchstones for the interpretation of revenue laws." Helvering v. Horst, 311 U. S. 112, 118 (1940).

One of the reasons stated in the above Senate Report (page 115) for not taxing the type of wagers carried on in gambling casinos was:

"However, the method of taxation provided, while particularly appropriate to bookmakers and to policy operators, does not appear readily adaptable to these other forms of gambling. For example, there are obvious practical difficulties in ascertaining the gross amount of wagers made in the course of a dice game and other games in which there is direct and continuous player participation."

But the Special Committee to Investigate Organized Crime in Interstate Commerce in its Third Interim Report (82nd Congress, 1st Sess. S. Rep. 307, p. 11) had recommended that:

"VI. Gambling casinos should be required to maintain daily records of money won and lost to be filed with the Bureau of Internal Revenue. They also should be required to maintain such additional records as shall be prescribed by the Bureau. Officials of the Bureau of Internal Revenue should have access to the premises of gambling casinos and to their books and records at all times. Where the casino is operating illegally, in addition to the aforementioned obligations, the operator of the casinos should be required to keep records of all bets and wagers.

The cash returns from gambling casinos are fantastic in amount. There is also, at the present time, no way in which the tax returns filed with the Bureau of Internal Revenue by the proprietors of these casinos can be adequately checked. The committee feels that one way of placing gambling casinos under control is to require them to keep daily returns to be filed with the Bureau of Internal Revenue and maintain prescribed books and records. These returns and the books and records should be checked frequently by visits from responsible revenue officials. Only through some such means can the Government obtain its proper share of the moneys which pass through the hands of proprietors of gambling casinos.

In order to maintain even a closer check upon the operations of the illegal gambling casinos, the committee recommends that such casinos be compelled to keep a record of all wagering and betting transactions which

take place within its walls. They should also be subspect to the obligation to maintain daily records for the Bureau of Internal Revenue and the obligation to permit inspection of premises and inspection of books and records at all times.

The committee is well aware that these provisions may well put illegal gambling casinos out of business." (Italics supplied.)

In the House of Representatives the following pertinent statements were made during debate (97 Cong Rec 6891-6892):

"MR. DOUGHTON (Chairman of the House Ways and Means Committee) * * * Fourth. Gambling Taxes: A new tax is added in the bill on gambling, which applies mainly to bookmaking and numbering transactions. The rate is 10 per cent of the amount bet. There is also an occupational tax of \$50 a year imposed upon a person liable to the tax and upon any person receiving bets for or on behalf of such person. The yield from this tax is estimated at around \$400,000,000.

MR. DONDERO: Mr. Chairman, will the gentleman yield?

MR. DOUGHTON: I yield.

MR. DONDERO: I thought gambling was illegal in this country.

MR. DOUGHTON: Well I guess it is in most States. There are many illegal things that are taxed. Just because they are supposed to be illegal, would the gentleman be opposed to taxing them? If gamblers make money at gambling; does the gentleman think they

⁹ Yet similar provisions apply to those wagers that are taxable under the Act. But gambling casinos are legal in Nevada, hence were exempted under this Act.

should not pay an income tax on the money they win, the same as other people pay taxes on money they earn by doing a hard day's work?

MR. DONDERO: I am not arguing against it. I am raising the question whether the United States should enter into taking a tax from an illegal transaction.

MR. COOPER: Mr. Chairman, will the gentleman yield?

MR. DOUGHTON: I yield to the gentleman from Tennessee.

MR. COOPER. Of course, this is a tax on gross receipts from gambling. If the income comes from some illegal activity, it is taxable under the Federal income tax laws.

MR. DOUGHTON: It is estimated that this tax will yield about \$400,000,000 annually. To that extent it will lighten the burden of other taxpayers. I hope no Member of this House will vote against this bill, but I am sure if he does he will not assign as a reason for voting against it the fact that we put a tax on gambling.

MR. HOFFMAN of Michigan: Mr. Chairman, will the gentleman yield?

MR. DOUGHTON: I yield.

MR. HOFFMAN: The gentleman from Tennessee (Mr. Cooper) made a statement about its being an income tax. Does it carry any implication that it is in any way a sort of license for those people engaging in those activities?

MR. COOPER: Mr. Chairman, will the gentleman yield?

MR. DOUGHTON: I yield.

MR. COOPER: Certainly there is no thought of intention to condone the activity in any sense.

MR. HOFFMAN of Michigan: But could it be so construed?

MR. COOPER: We certainly do not think so. We do not want it to be so construed. There is certainly no intention or thought of in any sense or in any way condoning the activity. But the fact remains that information received indicates that large sums of money are made through this type of activity, and we simply thought that an effort should be made to impose a tax on that type of activity.

MR. HOFFMAN of Michigan: Properly considered, then, it would be a sort of additional penalty on those unlawful activities, would it not?

MR. COOPER: If the gentleman will turn to page 55 of the Committee report he will find this statement:

'Proposals for a Federal tax on wagering are sometimes criticized as in effect sanctioning the carrying on of gambling activities in violation of such laws. Since its inception, the Federal income tax has applied without distinction to income from illegal as well as legal sources, and it has never been generally supposed that such application carried with it any implied authorization to carry on illegal activities.'

MR. HOFFMAN of Michigan: Then I will renew my observation that it might if properly construed be considered an additional penalty on the illegal activities.

MR. COOPER: Certainly, and we might indulge the hope that the imposition of this type of tax would eliminate that kind of activity." (Italics supplied.)

During the debate in the Senate over the question of an amendment which would disallow business expenses incurred in illegal wagering, Senator George, Chairman of the Senate Finance Committee, stated (97 Cong Rec 12362):

"MR. GEORGE: Mr. President, this amendment is decidedly objectionable. What is the amendment? It deals with a tax on net income under section 23(a), a deduction under section 23(a), and the proposal is not to allow a deduction for a house or for a clerk or for the lawyer who drew the income tax return, if the earnings were illegal, or if they were realized in wagering transactions in violation of a State law, I believe, it is said in the provisions.

Mr. President, I think this is clearly an unconstitutional provision, regardless of who has given an opinion to the contrary, because the tax is not on the net income, and it is not only inequitable but it is not legal to tax the gross income. Yesterday we voted to impose a tax of 10 percent upon the gross take or gross earnings or gross income, as, an excise tax. Persons are taxed 10% now if they are engaged in an illegal transaction. This amendment deals with a deduction under section 23(a) of the code, which relates entirely to deductions from the gross income in order to arrive at the net taxable income.

MR. KERR: Mr. President, will the Senator yield? MR. GEORGE: I yield.

MR. KERR: Is not this amendment an attempt to impose a penalty for a wrongful act, rather than in the spirit of a tax on net income?

MR. GEORGE: The Senator is entirely correct, and under the decisions of the Supreme Court it does not make any difference who says the contrary. If the real purpose is to punish an offense, it does not make any difference how it is to be done, it is inconstitutional, and that applies to this amendment. This amendment would prohibit a deduction from gross income in computing net income by saying 'You engage in some sort

of illegal transaction, and we will not allow you deductions for necessary expenses incurred by you in making that income.'

Mr. President, yesterday I submitted to the Senator from Tennessee, as the RECORD will show, when his first amendment was offered, the plain question whether or not he was offering all of these several amendments as a substitute for the committee amendment, and the answer was in the affirmative. Now the Senators are offering a series of amendments again.

Mr. President, these questions are matters to be decided by the Senators themselves, but so far as I am concerned, this proposal is clearly unconstitutional. Its main function is to pursh a wrongdoer, and that being so, it cannot be sustained as a revenue provision. I therefore am opposed to it." (Italics supplied.)

Senator George again stated (Cong Rec 12367-12368):

"MR. GRORGE: Yes; I think so, I think the man in the street has a great deal more sense than we give him credit for having.

I want to say one word about the license tax. The Senator calls it a license tax for selling liquor. I was district attorney and I was district judge, and I served on the reviewing courts of my State, and I convicted not one but many men because I was able to go to the Bureau of Internal Revenue to find that John Smith or Bill Jones or Jack White had paid for a liquor license. It was formerly \$25. It has gone up. It used to be \$25 back in those days.

MR. HUNT: It still is.

MR. GEORGE: I thought it was more than \$25. Everything else has gone up, and I thought it had.

MR. KERR: It is being raised in this bill.

MR. GEORGE: At any rate, I obtained that information from the Federal Government, and then the sheriff had to go and take the man into custody, when he had some other evidence that he was selling liquor. The fact that he had this license for which he paid the Federal Government was no defense to him whatever, but on the contrary rather hurt his case."

Senator Kerr during the date observed (97 Cong Rec 12236-12237):

"MR. KERR: * * * If the local official does not want to enforce the law and no one catches him winking at the law, he may keep on winking at it, but when the Federal Government identifies a law violator and the local newspaper gets hold of it and the local church organizations get hold of it and the people who do want the law enforced get hold of it, they say, 'Mr. Sheriff, what about it? We understand that there is a place down here licensed to sell liquor.' He says, 'Is that so? I will put him out of business.' The people say, 'We understand there are slot machines operating, and there is a record of where they are.' The people who want the law enforced can put pressure on the local officials.

But if on the other hand, there is no such information available to the general public, if the local official wants to wink at the violation of the law, he does so, and it is not a situation about which the general public knows. The Senator is aware, as I am, that many a local official has been run out of office and defeated for re-election because the people themselves knew that the local law was being violated and that the official in office was winking at it. When that happens the good people will run that official out of office." (Italics supplied.)

It is well known that various state statutes provide for outlawing gambling houses, penalizing the professional gambler or his employees, prohibiting the possession of various types of apparatus or devices used for the purpose of gambling, placing criminal responsibility upon individuals, such as the owners or agents of houses where gambling occurs, preventing public utilities from supplying their services to persons engaged in gambling, provide for the seizure and destruction of various gambling devices as well as the disposition of seized monies, which are the proceeds of gambling, even declaring gambling or wagering contracts to be void and unenforceable in the courts.

Only by shutting one's eyes to realities is it conceivable that under such circumstances would it be possible to openly conduct the type of illegal business here sought to be penalized even if one complied with the requirements of this Wagering Act.

Certain cases have been cited by Appellant in which tax and registration provisions under other statutes have been held valid in an attempt to persuade this Court to uphold the tax and registration provisions of the Wagering Act. All are clearly distinguishable:

In Sonzinsky v. United States, 300 U. S. 506, 512 (1937) this Court stated:

"The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. See Child Labor Tax Cases (Bailey v. Drexel Furniture Co.), 259 U. S. 20, 35, 66 L. ed. 818, 819, 42 S. Ct. 449, 21 A. L. R. 1432; Hill v. Wallace, 259

¹⁰ The Law of Gambling by Morris Ploscowe—The Annals, May 1950.

U. S. 44, 66 L. ed. 822, 42 S. Ct. 453; Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855. Nor is the subject of the tax described or treated as criminal by the taxing statute. Compare United States v. Constantine, 296 U. S. 287, 80 L. ed. 233, 56 S. Ct. 223. Here Sec. 2 contains no regulation other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure, and we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power."

The statute in the Sonzinsky case was entitled:

"An act to provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof." (Italics supplied.)

Section 2 of the Act required that every importer, manufacturer, and dealer in firearms as defined by the Act shall register with the Collector of Internal Revenue for each district in which such business is to be carried on and shall pay a special annual tax at specified rates. The sole question presented was the constitutional validity of Section 2. The defendant was a dealer in firearms as defined by the Act and he had been convicted for failing to register and pay the annual tax of \$200.

This statute did not exempt dealers from registration and taxation if licensed by the State. Dealers were not exempt from taxation and registration if the sales were "friendly." There was no provision requiring all employees to register

and each to pay the special tax and a 10% tax on gross receipts. The registration provisions were obviously an aid in the collection of revenue.

In the Brief for the United States filed in the Sonzinsky case by the Solicitor General, now Justice of this Court, the Constantine case was thus cited (page 15):

"United States v. Constantine, 296 U. S. 287, involved a tax of \$1,000 on the business of retail liquor dealers who operated in violation of the law of the States where the business was conducted. In view of the fact that the commission of a crime under State law was a condition to the imposition of the tax, this Court concluded that the tax was in fact a cumulative penalty for violation of State law, and, as such, beyond the power of the Federal Government."

In United States v. Docemus, 249 U. S. 86, 93 (1919), the Court, in discussing whether the provisions in question had any relation to the raising of revenue, stated:

"Considered of themselves we think they tend to keep the traffic aboveboard, and subject to inspection by those authorized to collect a revenue. They tend to diminish the opportunity of unauthorized persons who obtain drugs and sell them clandestinely without paying the tax imposed by federal law."

Under the Harrison Narcotics Act, there was no exemption from registration and taxation if licensed by the State. There was no exemption from registration and taxation because one gave narcotics away on a "friendly" basis. There was no provision requiring all employees to register and each to pay the special tax. There was no 10% tax on the gross receipts of the business. In fact the case did not in-

Doremus, a physician, had registered and paid the tax—but only whether the regulation requiring dealers not to distribute certain drugs except on certain forms had any reasonable relation to the collection of the tax imposed. Obviously the regulation had a rational foundation since without such sanction, dealers in narcotics could distribute the drugs to unauthorized persons. The provisions thus aided the collection of revenue. And such regulations were not in substance, police regulations designed upon compliance to make it impossible for physicians to dispense drugs.

- In McCray v. United States, 195 U.S. 27, 59 (1904), the taxing power was employed to obtain revenue from the sale of colored oleomargarine. Congress had passed a statute, the effect of which was to levy a tax on oleomargarine, free from artificial coloration that would make it look like butter, at the rate of a quarter of a cent a pound, and on oleomargarine, artificially colored to look like butter, a tax of ten cents per pound. The oleomargarine makers contended that the statute was not intended to raise revenue but was intended to prevent the sale of artificially colored oleomargarine and that on that account this Court should hold that the statute was beyond the power of Congress. This contention, of course, involved going beyond what appeared on the face of this statute. But even going outside of the statute, the oleomargarine makers never established in any way that this tax was prohibitive and regulatory. This Court stated:

"Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts of sale it is self-evident that on their face they levy an excise tax."

There was no exemption from tax if licensed by the State to sell oleomargarine colored to resemble butter. There was no 10% tax on the gross income of the business. Employees did not have to register and pay a tax and it was legally possible to operate the business in the various states. In fact, the oleomargarine business expanded and the Act was repealed.

In United States v. Sanchez, 340 U. S. 42 (1950), involving a civil suit for money due under the Marihuana Tax Act, Justice Clark, speaking for this Court, pointed out that the tax there levied was not conditioned upon the commission of a crime. In reaching its decision, the Court referred by way of comparison not contra to Lipke v. Lederer, 259 U. S. 557 (1922) and Tovar v. Jarecki, 173 Fed. 2d 449 (C. A. 7th Cir. 1949).

Compare Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 in which Justice Douglas, speaking for the Court, stated:

"Clearly this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. Head Money Cases (Edye vs. Robertson), 112 U. S. 580, 596, 28 L. ed. 798, 803, 5 S. Ct. 247. And see Sonzinsky v. United States, 300 U. S. 506, 81 L. ed. 772, 57 S. Ct. 554. It is so utilized here.

The regulatory provisions are clearly within the power of Congress under the commerce clause of the

constitution. These provisions are applicable only to sales or transactions in, or directly or intimately affecting, interstate commerce. The fixing of prices, the prescription of unfair trade practices, the establishment of marketing rules respecting such sales of bituminous coal constitute regulations within the competence of Congress under the commerce clause."

But the wagering statute rests on no other power but that under Article I, Section 8, clause 1 of the Constitution. The Doremus and Sanchez decisions could have been sustained on the Treaty Power, 38 Stat. 1929, 1932 (1912), see Missouri v. Holland, 252 U. S. 416 (1920); the Sonzinsky and McCray decisions on the federal commerce power. See present oleomargarine statute, 64 Stat. 20 (1950), 21 U. S. C. 347.

It also appears from the decisions in this Court that a high excise on a deleterious commodity or article dangerous to life and health affords less basis for an inference that the act intends a prohibition than does a heavy impost on a mode of doing business. In the Child Labor Tax Case, 259 U. S. 20 at 36, this Court stated:

"Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax it is clearly an excise If it were an excise on a commodity or another thing of value we might not be permitted, under previous decisions of this court, to infer, solely from its heavy burden, that the Act intends a prohibition instead of a tax. But this Act does more."

This statute is an unwarranted extension of federal responsibility for local criminal matters. Such extension, even

when essential to national ends and plainly authorized by the federal constitution involves great dangers of glutting the national tribunal with petty prosecutions, sapping the vitality of local government and undermining the constitutional rights of the accused. Professor Schwartz of the University of Pennsylvania has reviewed these dangers in an article on "Federal Criminal Jurisdiction and Prosecutor's Discretion," 12 L. and Contemp. Prob., p. 64 (1948).

If Congress chooses to incur such risks in the exercise of one of the constitutional powers, e. g. over interstate commerce, conferred upon the national government for the purpose of enabling it to deal with problems beyond the reach of the states, we should have only a problem of policy; but here, the very fact that Congress resorted to the tax power reveals the lack of genuine federal concern.

There is a general presumption in favor of constitutionality of all Acts of Congress. But such a presumption is no more conclusive than a presumption of fact, of which the Court said in *Lincoln v. French*, 105 U. S. 614, 617 (1882),

"Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear."

This Court has stated that certain rights occupy a preferred position in our society. Surely the right to engage in an occupation should occupy a similar position. And where a showing is made that a statute imposes confiscatory taxes, detailed obnoxious regulatory and self-incriminatory provisions designed if complied with to prevent the operation of the business, and in the same statute there are

¹¹ See United States v. Carolene Products Co., 304 U. S. 144, 151, Footnote 4 (1938).

exemptions from registration and taxation of similar types of business simply because they are legal under State Law, the usual presumption of the constitutionality of such legislation must disappear. Crant the validity of this Act and it would allow the Government to regulate and control through the medium of the tax power the life and liberty of every citizen. We shall then have a Police State instead of the United States of America.

II.

The Statute is unconstitutional because it violates the Due Process and Self-Incrimination clauses of the Fifth Amendment.

Appellee had presented to the court below, in addition to his motion to dismiss, briefs setting forth various reasons¹³ why the statute was unconstitutional (R. 3). Some of the reasons the court below rejected (R. 4).

Although rejected by the court below, this court may now consider them. In *United States v. Curtis-Wright Corp.*, 299 U. S. 304, 329 (1936), this court stated:

"The government contends that upon an appeal by the United States under the Criminal Appeals Act from a decision holding an indictment bad, the jurisdiction

¹² Note, The Presumption of Constitutionality Reconsidered, 36 Col. L. Rev. 283 (1936): "Moreover, the direct confiscatory tax might be subject to grave questions on constitutional grounds. (See U. S. v. Constantine, 296 U. S. 287, 1935.)" S. Rep. No. 725, 82nd Cong. 1st Sess., pp. 9, 93.

¹³ The reasons assigned in the Briefs filed in the lower court were:
1. The statute is vague and indefinite. 2. The statute violates the Due Process clause of the Fifth Amendment. 3. The statute imposes a penalty, not a tax. 4. The statute violates the Self-Incrimination clause of the Fifth Amendment.

of the court does not extend to questions decided in favor of the United States, but that such questions may only be reviewed in the usual way after conviction. We find nothing in the words of the statute or in its purposes which justifies this conclusion. The demurrer in the present case challenges the validity of the statute upon three separate and distinct grounds. If the court below had sustained the demurrer without more, an appeal by the government necessarily would have brought here for our determination all of these grounds, since in that case the record would not have disclosed whether the court considered the statute invalid upon one particular ground or upon all of the grounds alleged. The judgment of the lower court is that the statute is invalid. Having held that this judgment cannot be sustained upon the particular ground which that court assigned, it is now open to this court to inquire whether or not the judgment can be sustained upon the rejected grounds which also challenge the validity of the statute and, therefore, constitute a proper subject of review by this court under the Criminal Appeals Act. United States v. Hastings, 296 U. S. 188, 192, 80 L. ed. 148, 150, 56 S. Ct. 218.

In Langnes v. Green, 282 U. S. 531, 75 L. ed. 520, 51 S. Ct. 243, where the decree of a district court had been assailed upon two grounds and the circuit court of appeals had sustained the attack upon one of such grounds only, we held that a respondent in certiorari might nevertheless urge in this court in support of the decree the ground which the intermediate appellate court had rejected. That principle is applicable here."

A. The statute violates the due process clause of the fifth amendment in that it is vague and indefinite.

Under the Act a special tax of \$50 per year is paid by each person liable for taxable wagers or who is engaged in receiving wagers for or on behalf of any person so liable. By regulation (26 C. F. R. 325.21(b)) one who made a "friendly" type of wager, "that is a wager by one not in the practice of making wagers, was excluded from tax and registration. "The purpose of this requirement is to exclude from tax the purely 'social' or 'friendly' type of bet" (S. Rep. No. 781, 82d Cong., 1st Sess., p. 114). Furthermore, in defining the term "lottery" (Sec. 3285(b) 2), the statute states that "The term does not include (A) any game of a type in which 'usually' (emphasis supplied) * * *"

It is submitted that such distinctions in statutes which penalize conduct with criminal sanctions are so vague and indefinite as to be a violation of due process of law. Obviously all wagers, friendly or business, are made for profit and there would not be a definite guide for conduct according to the actualities of life to define a criminal offense because the act is done in a business rather than in a friendly way or because one engages in a type of game in which one "usually" does something. This imposes upon the individual the duty of guessing as to the propriety of his conduct. Many individuals bet on football and baseball games. Many bet on elections. The federal courts would have to decide whether they were engaged in the business of making wagers by first determining whether such conduct was considered wagering. There might be as many different intersidence.

¹⁴ For a typical example of a friendly non-taxable wager see (Appellee's Br. 26A).

pretations as there are courts. In Connally v. General Construction Co., 269 U. S. 385, 391 (1926), this Court stated:

"That the terms of a penal statute creating a new of fense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike, with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. * * *"

Court has attached to the existence of the requirement of scienter. United States v. Ragen, 314 U. S. 513 (1942); Herndon v. Lowry, 301 U. S. 242 (1937). The information here charges that Appellee has willfully failed to pay the special occupation tax and that he has willfully failed to register but it was not essential under Section 3294 (a), (b) of the Act that this be willful to constitute a crime. Here, as in International Harvester Co. v. Kentucky, 234 U. S. 216, 223 (1914), "The elements necessary to determine the imaginary ideal are uncertain."

Appellant may challenge the validity of the Act since it is applied to his own disadvantage.

B. The statute violetes the due process clause in that it is confiscatory.

Chief Justice Marshall once declared:

"The power to tax involves the power to destroy," Mc-Culloch v. Maryland, 4 Wheat. (U.S.) 316, 431. It has also been stated, "The power to tax is not the power to destroy, while this court sits," Justice Holmes dissenting in Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 223 (1928).

The special tax of \$50 per year to be paid by each person who is liable for the tax on the Sub-Chapter A may not by itself be confiscatory, but the excise tax imposed on their wagers equal to 10 per centum of the amount thereof is plainly confiscatory.

In McCray v. United States, 195 U. S. 27, 64 (1904) this Court said that if a case were presented where the abuse of the tax power was so extreme that it was "plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights, freedom and justice upon which the Constitution was based that it would be the duty of the court to say that such an arbitrary act was not merely abuse of delegated power but was the exercise of authority not conferred."

This is such a case.15

¹⁵ The Special Committee to Investigate Organized Crime in Interstate Commerce stated: "* * the direct, confiscatory tax might be subject to grave questions on constitutional grounds. (See United States v. Constantine, 296 U. S. 287 (1935)." S. Rep. No. 725, 82nd Cong. 1st Sess., p. 93.

C. The statute violates the fifth amendment in that it is arbitrary and discriminatory.

In Heiner v. Donnan, 285 U. S. 312, 326 (1932), this Court declared:

"That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the Due Process of law clause of the Fifth Amendment is settled."

The Wagering Act arbitrarily discriminates against persons who make it their business to make wagers by taxing both them and their wagers and causing them to register but excluding from tax and registration those who make wagers but do not make it their business (Appellee's Br. 3, 4, 7). The Act discriminates against persons who are engaged in wagering that is illegal in the States by taxing them and their wagers and causing them to register but excluding from tax and registration those persons engaged in wagering which are legal in the States.

The sole basis for the selection of the class to be regulated is that the members of the class are engaged in activity made illegal by State law. But this basis rests on an invalid and arbitrary discrimination in subject matter. United States v. Constantine, 296 U. S. 287; Smith v. Cahoon, 283 U. S. 553 (1931).

D. The statute violates the self-incrimination clause of the fifth amendment.

The Government filed the information on March 17, 1952 charging in Count I that the Appelled did on or about No.

vember 26, 1951, engage in the business of accepting wagers and did accept wagers and has willfully failed to pay the special occupational tax and in Count II that Appellee did engage in the business of accepting wagers and did accept wagers and has willfully failed to register for the special occupational tax.

The Appellee having engaged in the business of accepting wagers on or about November 26, 1951 was liable criminally for failure to pay the 10% tax due on these wagers, for failure to keep a daify record of the gross amount received (26 U. S. C. 3287); for failure to post or exhibit the stamp (26 U. S. C. 3294(b)); and for "any act which makes him liable for special tax." (26 U. S. C. 3294(a)).

Requiring Appellee to register and furnish information that could lead to the discovery of the above crimes and making his refusal to give this self-incriminatory information punishable by criminal sanctions is a violation of the Fifth Amendment.

If this were a criminal proceeding against the Appellee for any of the above offenses due, the Government could not compel him to supply the facts required by Form 11-C. These facts concern past as well as future conduct and different from the type of records required under Regulation 26 CFR 325.32 pertaining to the Wagering Act.

Furthermore, the Appellee was required to furnish information called for on the return as a condition to the issuance of the special tax stamp (without which it was unlawful to operate) that would clearly incriminate him and his employees under the laws of the state where the business was conducted.

In Boyd v. United States, 116 U. S. 616, 631, 632 (1886), the Court said that:

[&]quot;* * any compulsory discovery by extorting the party's oath * * * is contrary to the principles of a free

government. It is abhorent * * * to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

It is our contention that the Fifth Amendment also forbids such a compulsory disclosure under the circumstances of this case. 16

In United States v. Saline Bank of Virginia, 1 Pet. 100, 104 (U. S. 1828). Chief Justice Marshall declared:

"It is apparent, that in every step of the suit, the facts required to be discovered in support of this suit, would expose the parties to danger. The rule clearly is that a party is not bound to make any discovery which would expose him to penalties and this case falls within it."

Then in Brown v. Walker, 161 U. S. 591, 608 (1896), the defendant had refused to testify regarding certain freight rates although offered immunity under an Act of 1893 because he could not obtain immunity against future prosecution in the State courts. This Court stated:

"But even granting that there was still a bare possibility that by his disclosure he might be subjected to the criminal laws of some other sovereignty, that, as Chief Justice Cockburn said in Reg. v. Boyes, 1 Best & S. 311, in reply to the argument that the witness was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary courts, but 'a danger of an imaginary and unsubstantial character,

¹⁶ Borden, The Effect of Dual Sovereignty on the Privilege Against Self-Incrimination, 26 Temple L. Q. 64 (1952).

having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."

The English case of Reg. v. Boyes, cited in United States. v. Murdock, 284 U. S. 141 (1931), (together with King of the Two Sicilies v. Wilcox, 7 State Trials N. S. 1050, 1068 (1850)) was decided on the ground that the danger of imthat was no more than a remote possibility. The Wilcox case rested on the ground that no English judge can know as a matter of law what would be penal in a foreign court.

However, in Hale v. Henkle, 201 U. S. 43, 69 (1906), this

Court declared:

"The question has been fully considered in England and the conclusion reached that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty."

But in United States v. McRae, L. R. 3 Ch. App. 79 (1867), the Court distinguished the Wilcox case stating that there was nothing on the face of the proceedings in the Wilcox case to indicate what the foreign law was applicable to the case or even whether "the defendant had incurred any penalty or forfeiture by acting in this country as the agents of the revolutionary government in Sicily * * *. It is a case entirely distinguishable from King of the Two Sicilies v. Wilcox * * *. There it was not shown that the defendants had rendered themselves liable to criminal prosecution."

In Ballmann v. Fagin, 200 U. S. 186, 195, 196 (1906), Justice Holmes delivered the opinion of the Court:

"Not impossibly Ballmann took this aspect of the matter for granted, as one which would be perceived by the court without his disagreeably emphasizing his own fears. But he did call attention to another, less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a bucket shop, and so subject to the criminal law of the state in which the grand jury was sitting. According to United States v. Saline Bank, 1 Pet. 100 7 L. ed. 69, he was exonerated from disclosures which would have exposed him to the penalties of the state law. See Jack v. Kansas (decided this term), 199 U. S. 372, ante; 234, 26 Sup. Ct. Rep. 73. One way or the other we are of opinion that Ballmann could not be required to produce his cash book if he set up that it would tend to criminate him."

But in United States v. Murdock, 284 U. S. 141, 149 (1931), Sustice Butler, speaking for this Court, stated:

"The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for federal purposes may not be prevented by matters depending upon state law. Const. art. 6, §2. The English rule of evidence against compulsory self-incrimination, which historically that contained in the 5th Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. Two Sicilies v. Wilcox, 7 State Tr. N. S. 1050, 1068; Reg. v. Boyes, 1 Best. & S. 311, 330, 121 Eng. Reprint, 780."

And then in *United States v. Murdock*, 290 U. S. 389, 396 (1933), Justice Roberts stated:

"* * Not until this Court pronounced judgment in United States v. Murdock, * * * had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law."

We submit that the danger to the Appellee if he answered the questions of Form 11-C was not "imaginary and unsubstantial" and that prosecution under State law would not be "so improbable that no reasonable man would suffer it to influence his conduct." It would be necessary to discover "evidence of crime against state law" in order to determine whether Appellee was engaged in the business of accepting wagers. To require, therefore, the Appellee to supply such information is to compel him to give evidence that could be used against him for violation of the state criminal laws pertaining to wagering and the federal lottery laws. Proof of payment of the stamp tax would be admissible in all courts as evidence that one was engaged in the business of wagering. (See annotations under 26 U. S. C. 3276, Note 9.)

The purpose of this registration is obviously not to obtain and protect revenue but to enable the various local authorities to have the assistance of the Federal government in apprehending bookmakers and those engaged in the lottery business.

^{17 18} P. S. 4601, 4602, 4603, 4607 (Pa.).

¹⁸ 18 U. S. C. 1301, 1302. This Court takes judicial notice of State statutes. Mills v. Green, 159 U. S. 651, 657 (1895).

Chief Justice Vinson in Shapiro v. United States, 335 U.S. 1, 32 (1948), declared:

"It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself."

The taxing power here is solely used to augment the criminal laws of the various states. It compels Appellee to admit he is violating the gambling laws of the State.19

This information, unlike income tax returns, is open to public inspection, available to local prosecutors.20 (It is

20 In the New York Herald Tribune, Sunday, Jan. 6, 1952, p. 1,

cont'd on p. 20, the following statement appears:
"Plans for continued investigation into organized crime call for the United States Attorney in each district to invite heads of the Federal enforcement agencies to appear before the grand jury. In addition officials of state, county and municipal police departments and representatives of local crime commissions will be expected to testify.

In this way, the Justice Department hopes, the grand jurors will be furnished with the identity of the local underworld figures and background information on crime which should be of great value for general law enforcement.

Special Unit Set Up: A special rackets unit has been established in the criminal division of the Department of Justice under Assistant Attorney General James M. McInerney, chief of that division. Its task will be to co-ordinate the entire program on a permanent basis.

This unit will use information uncovered by grand jury proceedings to fill out the records of underworld characters originally compiled for the Kefauver committee. The unit will turn information concerning local criminal conditions over to state and local authorities for action, thus carrying out one of the important recommendations of the Kefauver committee."

¹⁹ An admission of being engaged in such an unlawful enterprise might lead to evidence of other criminal violations. Hofman v. United States, 341 U. S. 479 (1951); Greenberg v. United States, 343 U. S. 918 (1952); Singleton v. United States, 343 U. S. 944 (1952). See also United States v. Lombardo, 228 Fed. 98 (1916). Aff'd on alternate ground, 241 U. S. 73 (1916).

compulsory self-incrimination, 21, 21a

21 AN ORDINANCE MAKING IT UNLAWFUL FOR ANY PERSON TO POSSESS, WITHIN THE CORPORATE LIMITS OF THE CITY OF MOLINE, ILLINOIS, A FEDERAL WAGERING STAMP, ISSUED UNDER THE PROVISIONS OF THE FEDERAL REV ENUE ACT OF 1951, AND PROVIDING PENALTIES THERE

WI EREAS, under the provisions of the 1951 Revenue Act enacted by the Congress of the United States a tax is imposed on wagering; and, in addition thereto, any person engaged in any way in wagering is required to pay a special Occupational Tax of \$50.00 per year and register with the Collector of Internal Revenue and receive a stamp denoting the payment of such special tax, which he shall place and keep in his principal place of business, except that if he has no place of business he shall keep such stamp on his person; and

WHEREAS, the procurement and possession of such a stamp is indicative that the possessor of such a stamp intends to engage in wager-

ing or gambling; and

WHEREAS, under the laws of the State of Illinois and the ordinances of the City of Moline it is unlawful for any person to engage in any form of wagering, even though he may have a Federal Wager-

ing Stamp; and

WHEREAS, the possession of such a stamp gives no authority or license to violate the laws of Illinois or the ordinances of the City of Moline; and, in order to aid the enforcement of the ordinances of the City of Moline and the protection of the public peace and morals and police power of said City, it is deemed necessary to prohibit the possession of such stamps within the corporate limits of said City; now,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MOLINE, ILLINOIS:

That it shall be unlawful for any person within the cor-Section 1. porate limits of the City of Moline, Illinois, to possess a Federal Wagering Stamp issued under the provisions of the Revenue Act of 1951

enacted by the Congress of the United States.

Section 2. Any person violating the provision Section 2. Any person violating the provisions of Section One (1) hereof shall be deemed guilty of a misdemeanor, punishable by a fine of not less than \$25.00 nor more than \$50.00 for each violation, and each day any person possesses, within the corporate limits, a Federal Wagering Stamp shall constitute a separate offense.

Section 3. This Ordinance shall be in full force and effect from and

after its passage, approval, and publication as provided by law. Passed: March 25, 1952 A.D.

21a WEDNESDAY, NOV. 19, 1952—THE MIAMI HERALD—1-DE LOTTERY KING FACES CHARGE OF CONSPIRACY.

Dave Marcus, 52-year-old lottery kingpin under indictment for bookmaking by the county grand jury, was named Tuesday in a Circuit court suit charging him with conspiracy to violate state gambling laws.

It was one of three suits filed by State Attorney Glenn C. Mincer citing purchase of federal gambling stamps as evidence of conspiracy to violate the law.

Other defendants named Tuesday by Mincer and Assistant State Attorney John D. Marsh are B. E. Brandt, 2425 NW 23rd Ave., and Enrique and Jose Renedo, 80 NW 20th St.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

JACOB KOSSMAN, 1325 Spruce Street, Philadelphia 7, Penna., Counsel for Appellee.

December 1952.

The new suits brought to 16 the number filed by Mincer and Marsh in the last month against federal gambling stamp purchasers. In one of the suits, Circuit Judge Marshall C. Wiseheart upheid Mincer's right to file the conspiracy charges on basis of the federal stamp purchases. The defendant's attorney said he would appeal Wiseheart's ruling to

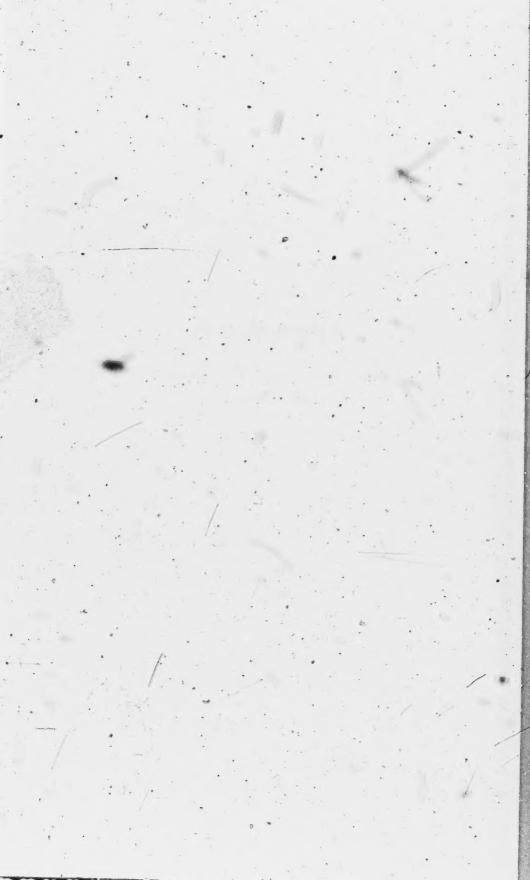
the Florida Supreme Court.

Mincer said 19 of the suits would be filed.

Marcus, whose address was listed as 6181 SW 49th St., was indicted Noves by the grand jury on charges of setting up a lottery, bookmaking and conspiracy to violate the gambling laws. He was freed under \$5,500 bond.

Appendix A

(Miscellaneous: Newspaper and Magazine Articles; Stat.stics.)



THE EVENING BULLETIN, PHILADELPHIA, WEDNESDAY, MAY 7, 1952, P. 16 (EDITORIAL).

"As it is expected that the decision of Judge Welsh in Federal District Court here will be appealed, the opinion of the higher Courts on the constitutionality of the gambling stamp tax is still to be obtained. The particular point here involved does not appear to have been passed on previously.

"The feature requiring gamblers to register for the purpose of purchasing a stamp and to make certain disclosures as to other persons is ruled unconstitutional as a police measure in the guise of a tax provision. The tax on gam-

blers' earnings is not affected.

"As a revenue provider the law has proved a flop. Four months' experience indicated that its yield-over a whole year would be nine millions instead of the \$400,000,000 some

optimists had predicted.

"Revenue was not the aim of the measure; but the desire to impose some check on an evil which the revelations before the Kefauver committee had shown to have nationwide ramifications. Of course the information forced from the gambler could not be used against him, but it furnished valuable clues to the police throughout the country as to the persons in the business. As the gambler and his employes and associates work in secret, the law tended to throw light into the crime underground. It was thus a headache and a serious embarrassment to the gamblers, as it was designed to be. The long-range workings of the measure have yet to be disclosed.

"With citation of an important preceding Supreme Court decision the measure is now held to be unconstitutional. Ultimate decision on the issue is of great importance."

(Italics supplied.)

CHICAGO DAILY TRIBUNE, SATURDAY, MAY 10, 1952 (EDITORIAL).

"The Tribune's attitude on gambling has been expressed so often and so clearly that no one will misread our motives in saying that we believe that federal District Judge Welsh in Philadelphia was right in declaring the \$50 federal gambling licensing tax unconstitutional. The judge declared that the statute was a police measure enacted under the guise of a tax bill and that the principle, if extended, could prove extremely dangerous.

"Congress was certainly aware when it passed this legislation that it was not doing so to produce revenue, but to put the gamblers out of business. It may be held that the end justified the means, especially when crooked local authorities refuse to do their duty, but the principle is perilous because it can jeopardize the rights of citizens who are not

of a disreputable character.

"'If the fundamental principles claimed by the federal government in this particular case were upheld by the highest judicial power,' said Judge Welsh, 'future acts of the government in a field not so free from improper motives would regulate our lives from the cradle to the grave. This remedy would be fare worse than the disease.'

"In requiring every gambler to obtain a license for himself and all of his agents, the law requires a man to be a witness against himself and an informer against others. This flies in the face of the constitutional right to refuse testimony that is self-incriminating, although the disingenuous explanation is offered that to confess to federal authorities a disposition to violate a state law is of no interest to federal authorities, enforcement being up to state officers.

"The effect, however, is to compel local authorities, however reluctant, to take action to limit the carrying on of gambling under the federal license, for the gamblers, their agents, and their place of operation are a matter of public record. The law achieves its fullest effect by deterring the gamblers from seeking licenses or carrying on operations in the first place. It may be assumed that, although both gamblers and law enforcement authorities are put on the spot by the registration of licenses, there is still some collusion among politicians, police, and gamblers permitting gambling to operate.

"The suppression of gambling depends upon honesty in law enforcement. If the people want to outlaw gambling, their recourse is to get a set of local officials who will do so. It is dishonest to seek to achieve that result by indirection, particularly when, as Judge Welsh emphasizes, a similar resort to police measures disguised as tax legislation can be turned against all honest citizens."

TIME, NOVEMBER 12, 1951, p. 23.

bring in \$400 million. From the way things looked last week, it might never bring in \$4,000. But it had a far more profound effect, which may have been the real intention of Congress when it wrote the new law; the gambling business of the United States almost came to a standstill. A 10% tax on gross business was probably more than the traffic would bear. Even more discouraging was form 11-C.

THE NEW YORK TIMES, SUNDAY, MAY 11, 1952 (EDITORIAL).

"Last November 1 a Federal statute went into effect requiring professional gamblers to purchase a \$50 tax stamp and pay a 10 per cent tax on their winnings. Congressional backers of the measure called it a revenue bill, and estimated it would bring in as much as \$400,000,000 a year. Opponents called it simply a device to crack down on gambling, which is not a Federal offense. As a matter of fact, the Government has reported that 90 per cent of the nation's bookmakers have gone out of business rather than pay the taxes. By paying the taxes they would go on record as violators of state law, except in Nevada where gambling is legal * * *"



NATIONAL AFFAIRS, MAY 19, 1952, PP. 33, 34.

"Highpockets George leaned against a lamp post and watched the Times Square traffic go by There was a pleased expression on his face. 'That old judge in Philly,' he said. 'He's sure putting the bookies back in business. All the boys are coming out of the woodwork. They ain't afraid of Uncle Syndicate no more.'

"The 'judge in Philly' was Federal Judge George A. Welsh. It was his decision last week which, at least temporarily, promised to break the back of the law requiring professional gamblers to register with the government, buy a \$50 tax stamp which they were to carry about with them or post prominently in horse parlors and gambling houses, and pay a 10 per cent tax on their gross.

"The law, which had gone into effect last November, put a quietus on bookmaking, the numbers game, and other forms of gambling. In states where gambling was illegal, bookies complained that Uncle Syndicate's cut on the gross handle was so big that many bookies couldn't operate.

This, of course, was the intent of Congress. Though there had been some talk of raising \$400,000,000 in added revenue, what Congress really wanted was to put the bookies and the policy boys out of business. It had succeeded admirably. Most bookies were too afraid to buck the Federal Government and had retired to honest labor and other onerous pursuits. In six months, the Treasury had collected less than \$3,000,000 from the sale of stamps and the 10 per cent tax.

"Judge Welsh's decision came in unexpectedly—'like a 40-to-1 shot,' a bookie said. He ruled last Tuesday that the \$50 tax was unconstitutional. It was a punitive police measure, disguised as a tax bill, Welsh said. And, he noted, it

forced a gambler to testify against himself—a violation of the Fifth Amendment.

"In some areas, the Welsh decision brought jubilation. In New York City, where bookies had once jostled each other in the Midtown section, scratch sheets, pads, and pencils began to emerge. In Los Angeles, bookmakers predicted that business would be better than ever. In New Orleans, a Federal and a local grand jury were holding hearings and police were jumpy. But gamblers thought the Philadelphia decision would eventually open things up.

"Elsewhere, gloom continued. In Florida, where the gambling take had dwindled from \$120,000,000 to \$1,500,000 a year, bookmakers saw no hope of relief from the state clampdown brought on by the Kefauver hearings. In Detroit and Chicago, the gambler's policy was one of watchful waiting.

"But most discouraging of all was the determination of Internal Revenue Commissioner John B. Dunlap to go right on collecting the gambling tax and imposing the tax stamp 'pending final adjudication.' And Government lawyers promised to carry the fight against Judge Welsh's ruling right up to the Supreme Court."

NEWSWEEK, DECEMBER 12, 1951, P. 30.

What really broke the bookmaker's morale was a clause in the law which provided that the \$50 tax stamp be displayed prominently in the place of business, or carried on the person. Lists of the "registered" gamblers, moreover, would be open to public inspection. In areas where gambling is illegal, "public" means newspapers and cops.

** Fifteen bookies in Brooklyn piled into their tax consultant's office. He advised them to quit the business cold. "This will force a lot of them into crime," he said seriously. "Many haven't worked in 20 years and some not at all."

Wo Cleveland policy operators, grossing \$1,000,000 a year, closed their door with an announcement that they could not

afford \$50 stamps for their 700 employees.

* * Gambling is legal in Nevada, but the prohibitive cost of Federal regulation shut down most of the state's 24 books, forcing the bookies to apply for unemployment compensation. Horse, football, basketball, and baseball parlors in the lush Las Vegas resort hotels were bleak and dark.

* * Offices of Internal Revenue Collectors waited patiently for the gamblers to line up for tax stamp applications. But business was slow. Of New York City's 10,000 bookmakers, only 200 picked up the forms—and most of them said they were acting "for a friend."

Even the few who were willing to acknowledge their business were fearful of catching the tax man's eye. The Revenue Bureau, however, wasn't going to wait for the shy ones to step forward. In regional offices, long lists of known gamblers were being compiled and the registration forms were being mailed out.

U.S. NEWS AND WORLD REPORT, NOVEMBER 16.

Both management and labor in the gambling business find themselves faced with jail terms if they register to pay the tax and severe penalties, including jail terms, if they fail to register and pay the tax. Fines can total as much as \$25,000 for disregarding the law plus a fine equal to the amount back tax owed. As a result, shutdowns are occurring all up and down the line and consternation reigns.

Big and little operators are affected alike. * * * Size is a handicap, if anything. No one appears safe. In San Francisco, for example, operators of Allied Lottery, a \$100,000 business—have publicly quit. In New York, a "tremendous drop" in the number of gambling operators is reported. In Miami, 1,000 of the new tax forms were mailed out to known gamblers after no one asked for the forms, needed to stay in business without violating U. S. law. In Los Angeles, only 6 out of 10,000 known bookmakers applied for the tax stamp when the new law went into effect. Even in Nevada, where gambling is legal, 22 of the 24 State-licensed gambling operators shut down. Thousands of "bookies" have quit, at least temporarily.

Under the new law, as gamblers see it, there are four courses they can follow:

THEY CAN COMPLY with the law. But this would mean almost automatic arrest by local or state police as soon as the gamblers register, so only a handful who can afford high-priced protection or want to take a longshot chance plan to follow that course.

THEY CAN CLOSE UP and hope that a court test, already planned in a Washington, D. C. court, might knock out the new tax. Most gamblers are doing that, at least for the time being. The hope is that the law will be declared unconstitutional because it forces those who comply with it to incriminate themselves. Odds are, however, that the court fight will be long, the outcome doubtful.

THEY CAN GO UNDERGROUND much further and build up a system comparable to that of prohibition days, with lottery on a bootleg basis. This is certain to be tried, but the risks of tangling with Treasury officers is great and will grow greater as the number of such officers is expanded. Evidence of gambling, uncovered years later, will be enough to warrant a penitentiary term and penalties which could total up to \$25,000 plus twice the amount of tax owed.

THEY CAN SHIFT OPERATIONS to card games, dice games, roulette, or other forms of gambling not covered by the new federal law. * *

This shift to untaxed forms of gambling already has begun on a small scale * * * But the demand for this service is thought to be strictly limited.

Which course will be followed by most of the hard-hit gambling operators will depend largely on how effectively the new tax law is enforced, and how much cooperation is given by local police officials.

But even partial enforcement of the tax law will greatly increase the hazards and costs of trying to ignore it. In New York the Internal Revenue Bureau has assigned an agent to each of the five "gambler" courts and each time city police bring in a gambler he is served with a notice of failure to register. This alone can mean a \$5,000 fine in addition to city penalties. Double penalties, in other words,

face each bookie or runner arrested by local police, as 12,361 were in New York the past year,

Full scale enforcement of the tax law, however, is to be tried. * * * Cost is estimated at about \$34 millions, but fines collected are expected to cover this overhead even if the tax itself yields little revenue. This means that several hundred federal agents will operate in every large city, with dozens in each small city as well.

NEW YORK TIMES, NOVEMBER 1, 1951

"The \$2 horse bettor and the 10 cent numbers player became the victims of shortened pay-offs as the new Federal tax on professional gardolers went into effect last midnight.

"With many gamblers suspending operations to await developments, several local bookmakers reduced their pay-off limits from 50 to win, 20 for place and 10 for show, to 30, 12 and 10. The policy racketeers, meanwhile, sliced their pay-offs on the winning numbers from 700-to-1 to 400-to-1.

"About 200 application forms were picked up at Internal Revenue offices here yesterday. The forms, when filled out and accompanied by a \$50 stamp tax, register the applicant as a professional gambler who must then pay to the Government 10 per cent of his gross income. Tax collectors said they had no many of telling how many of the forms sought to date would eventually be filed by gamblers and how many were just picked up for study or for curiosity.

"Bookmakers, policy operators and their employes have until the end of this month to make their first returns.

"Until yesterday, most bookmakers limited their pay-offs on longshots to 50-to-1 for winning horses. By reducing the odds, with a corresponding cut in place and show pay-offs, the bookmakers count on building up a kitty that may be used toward the new Federal tax or for graft to avoid the tax payments, whichever the bookmakers decide is the sounder investment.

"The Police Department announced that its legal department had set up a procedure for cooperation with the Federal Government on the next tax. When police make arrests on bookmaking or policy charges the police will notify the Federal authorities. They also will notify the Internal Revenue Bureau of the disposition of such cases. Convicted

professional gamblers will be subject to Federal penalties of five years in prison and \$1,000 to \$5,000 fines if they have not registered for the Federal tax.

"Even in Nevada, where gambling is legal under state law, bookmakers decided that the new 16 per cent bite would rum their business. State-licensed bookmakers said it would be 'economically unsound' to remain in business. A group of bookmakers in Reno sought a way out of the dilemma by levying on the bettor a 10-cent tax for every dollar he put up.

"In Cleveland, two big policy operators, Buster Matthews and Joe Allen, announced their 'retirement' as of midnight. Matthews, who admitted grossing about \$1,000,000 last year, said he could not afford to buy \$50 stamps for each of his 700 employes, let alone pay the 10 per cent tax on his gross business. Kansas City authorities said they expected some employes of bookmakers to apply for unemployment compensation."

PHILADELPHIA DAILY NEWS, TUESDAY, NOVEMBER 27, 1951, P. 5.

"Don't be a bit surprised if your favorite bookmaker or numbers man tells you when next you bump into him that

he's in a new racket now-bootlegging.

"The recently established Federal 10 percent tax on those who take bets for a living—and a handsome living it was, too—has resulted in 70 to 90 percent of the horse books in Philadelphia suspending operations, and the Daily News has information that many of them are starting up in the old business that flourished so profitably for the underworld during Prohibition.

"'Why not?' the book asks. 'With these higher Federal taxes on booze, the guy with an average income just can't afford to pay for his Christmas supply at standard rates. This new Federal bite of 10 percent of the gross hurts me. So we get together, I fix him up with a quart of drinking whiskey at \$3. He's happy and I'm making money again.'

"This newspaper has learned that more and more people are looking for liquor through illegal channels every day because of the tax-ridden prices of store and bar stocks: As the book said, the guy with a \$50-a-week income and a family to support just can't dig down for whiskey at \$4.50 a bottle.

"Come Saturday, the bookie will be breaking the law if he doesn't file a return of his receipts and take out that \$50 occupation stamp. Yet so far not a single gambler has bothered to report his income or obtain a stamp at the Internal Revenue offices in Philadelphia.

"Reports indicate that the gamblers are not defying the new tax; they simply have suspended operations in the face

of the current situation.

"In upstate Pennsylvania, they are out of business altogether in some towns. You can't get a bet down on the street. Over in New Jersey, however, there are some sections where the books still operate.

"The increase in bootlegging was noticed in New Jersey last week, where the Alcohol Tax Unit of the U. S. Government seized seven stills in one area. One place was so elaborately equipped it had a printshop for the printing of counterfeit tax stamps and brand labels.

"With Christmas rush on liquor buying, the erstwhile gambling men want to crowd into bootlegging fast to share in the juicy market for contraband. There are various outlets. One is the direct maker-to-consumer route. Then there are distributors who will handle it in bulk for a middle man's slice. Also, unscrupulous taproom dealers who don't mind substituting phony labels for the real thing.

"Why has the new 10 percent tax had the effect of forcing so many bookies to suspend operations?

"First of all, they say they stand to lose money through a 10 percent swipe at their gross revenue, plus the \$50 feet to run. Bookies figure that their average profit runs anywhere from 15 to 18 percent of the take. Knock off 10 percent for the excise tax, plus overhead expenses, and they're in the red, they assert.

"Let's take an operator who runs a basketball pool. He gives a customer 3 to 2 odds of \$75 to \$50, on a certain team with allowance of 10 points. He also gives 3 to 2 on another team, \$150 to \$100, with eight points. The player wins the \$75 bet, and the book wins \$100 on the other wager. That leaves a profit of \$25, but with a 10 percent tax on the total \$150 the customer bet, the book is left with a measly \$10 out of the whole amount the bettor turned over to him. That is not enough, the book complains.

"There is another reason why the gamblers are lying low. Samuel H. Rosenberg, public safety director, has made it known he'll turn over the names of any gambling suspects

to Federal authorities. Thus, the arrested bookie faces not only prosecution by the Commonwealth, but a Federal rap if he hasn't reported his earnings.

"For failing to pay the monthly tax, the punishment is , five years in the clink and a \$10,000 fine. For failing to take out the \$50 stamp, there are fines of \$1000 to \$5000 and five years in jail.

"A survey by the United Press has shown that gamblers across the country are ignoring the invitation to go legal. Of 30 cities and states checked, including Philadelphia, total sales of stamps amounted to less than 100.

"In Chicago, where 400 books were thought to have flourished before November 1, only two stamps had been sold. One of these went to a Pullman porter who read about the new stamp law and decided the purchase of one would permit him to start in the gambling business.

"Only four of the stamps had been sold to date in New York City. Four more applications were being processed. Largest number of sales was reported in Kansas City, Mo.,

where 18 stamps were sold.

"A test case of the constitutionality of the law was under way in Washington, D. C. A three-judge tribunal will hear the case. Attorneys who filed it contend the law amounted to self-incrimination for applicants who answered the questions.

"Rep. John W. Byrnes (R.), Wisconsin, said even if the tax fails to raise the anticipated \$407,000,000 in revenue, it has had the 'good effect' of driving many bookies out of business. He said the tax has not been in effect long enough to judge it fairly."

NEW YORK TIMES, WEDNESDAY, MAY 7, 1952, P. 37.

"Up to March 31, the law has brought into the easury \$547,992.83 in stamp taxes and \$2,248,327,47 in excise levies through the 10 per cent tax on a gambler's earnings.

"A total of 19,500 persons filed the special tax return and application for registry. During the first five months' operation of the law, 281 cases were referred to the Department of Justice for prosecution, of which thirty were closed with conviction ranging from a year and a day imprisonment to fines and probations."

THE WALL STREET JOURNAL, NEW YORK, WEDNESDAY, MAY 7, 1952, P. 1.

"* * The law has been a failure as a revenue producer but has driven a lot of bookies and gamblers under cover."

THE EVENING BULLETIN, PHILADELPHIA, TUESDAY, MAY 6, 1952, P. 32.

gambling by 90 per cent in the United States. A Philadelphia survey showed that 70 per cent of the city's bookies had been driven out of business by the taxes."

NEW YORK JOURNAL AMERICAN, TUESDAY, MAY 6, 1952, P. 1.

"* * Revenue officials have said the law is a failure as a money producing measure but has dealt gambling a terrific blow, closing many big time bookie operations."

THE EVENING BULLETIN, PHILADELPHIA, FRIDAY, MARCH 21, 1952.

ROCK ISLAND, ILL., MARCH 20-(AP).

"All 59 holders of federal gambling tax stamps in Rock Island county have turned them over to the county grand jury and asked that they be returned immediately to the Government for cancellation.

"State's Attorney Bernard J. Moran said the mass surrender of the stamps yesterday leaves the county with no

gambling tax stamps.

"He declared the 50 versons were subpensed to tell why they bought the stamps and whether they had used them for gambling operations."

THE EVENING BULLETIN, PHILADELPHIA, SATURDAY, AUGUST 23, 1952, P. 2.

"Washington, Aug. 23-The Bureau of Internal Revenue says the law Congress wrote last year to make gamblers pay taxes—a move designed both to put them out of busi-

ness and to raise revenue—is just not working.

"Not much money has been collected in taxes, and gambling is still widespread, it said this week in a monthly activity report reviewing what has happened between the time the law went into effect last November and the end of fiscal year 1952 on June 30.

"The law provided that certain gandolers must register as such and buy a \$50 occupation stamp each year, then pay a tax amounting to 10 per cent of their total take.

"The bureau said in its report:

"When reviewed in the light of expectations of the legislators, the wagering tax provisions have failed to produce the desired results.

"It appears that the tax yield in a full year of operations will be about eight million dollars, or two per cent of the original estimate of 400 millions. As a regulatory measure, the provisions may prove equally noneffective." "

THE PHILADELPHIA INQUIRER, WEDNESDAY, MAY 7, 1952, PP. 1, 2,

"* * Government officials have claimed that the 'occupational wagering tax' had cut illegal gambling in the United States by 90 percent. A survey in this city showed that some 70 percent of the bookies had been driven out of business by the taxes.

"A total of 18,913 stamps have been sold nationally, the Internal Revenue Bureau reported. Since Nov. 1, the effective date of the law, \$2,796,000 has been collected in stamp receipts and gambling tax levies."

LOS ANGELES TIMES. WEDNESDAY, MAY 7, 1952, P. 2.

"* * Capt, James Hamilton of the police intelligence unit, said no unusual activity among gamblers as a result of the eastern ruling had come to his attention. He said regardless of the final outcome on the stamp provision, the 10% deduction itself (unaffected by the ruling) will be a severe deterrent to gamblers resuming operations."

ACCOUNTANT'S WEEKLY REPORT, JULY 21, 1952, Vol. 10—No. 44.

Go East. Bookies. Go East: A Federal District Court in California holds that the occupational tax and registration requirements imposed on bookmakers and lottery operators is constitutional [E. L. Smith, USDC, S.D., Cal., 7/3/52]. In the Keystone State it isn't constitutional, at least for the time being [Kahriger USDC, E.D., Pa., 5/6/52].

THE PHILADELPHIA EVENING BULLETIN, OCTOBER 8, 1952.

\$15 GETS MAYOR \$10 BUT YANKEES HAD HIM WORRIED

Mayor Clark, an old ball player himself, bet \$15 to \$10 on the New York Yankees to beat the Brooklyn Dodgers in the World Series.

The mayor who played in the outfield at Harvard, said today, now that the tension's over, that he won the bet from William Trotter Newbold, a metals broker.

"I was a little worried after the fifth game," he admitted.

But the Yanks came through."

chark admitted that his average on picking winners was in need of improvement. He picked the Phillies and Cleveland to win the pennants.

"But I was smart enough not to bet on them," he said.

The mayor commented that he sees nothing wrong in little friendly wagers but is opposed to legalized gambling.



U. S. TREASURY DEPARTMENT INTERNAL REVENUE SERVICE (Revised November 1901)

APPLICATION FOR LICENSE FEDERAL FIREARMS ACT

	W		Date)
Name of applicant (print)			
rade name			
Address		***************************************	
(Principal place of business)	(City or town)	(County)	(State)
The undersigned hereby applies for a license ande	n coeffice O of the Think		
The undersigned hereby applies for a license under	r section 3 of the Federal	Firearms Act to tr	ansport, ship, and rec
regume and ammunition in interestate and family	1		
rearms and ammunition in interstate and foreign comm	merce as		and state
ollows:	0 (M	nufacturer or dealer)	
	*		
The applicant is not a fugitive from justice as defin			
The applicant is not a fugitive from justice as defin	ned in section 1 (7) of the	Act and is not now	under indistruent for
a name has assisted of a simulation in	in decide z (1) or the	act and is not now	under indictment for,
as never been convicted of, a crime of violence as defin	ned in section 1 (6)		
The applicant carries on business at the following	additional and on the		•
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(Any person *** who makes any statement in applying			
(Any person *** who makes any statement in applying false, shall, upon conviction thereof, be fined not more	than \$2,000, or imprisoned		
Federal Esperant A.A.	than \$2,000, or imprisoned		
(Any person *** who makes any statement in applying false, shall, upon conviction thereof, be fined not more Pollars Cents Federal Firearms Act).	than \$2,000, or imprisoned		
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Dollars Cents Federal Firearms Act). Casth Check Post office M. O.	than \$2,000, or imprisoned		

1. The Federal Firearms Act approved June 30, 1938, as amended, provides that it shall be unlawful for any manufacturer or dealer, unless Beensed under the Act, to transport, ship, or receive any firearm or ammunition in interstate or foreign commerce. Manufacturers and dealers desiring licenses may secure them by application to the collector of internal revenue for the district in which is located the applicant's principal place of business.

The term "manufacturer" means any person engaged in the manufacture or importation of firearms or ammunition for purposes of sale or distribution.

The license fee for manufacture is \$25 per annum.

The firm "dealer" means any person engaged in the business of selling firearms or ammunition at wholesale or retail, or any person engaged in the business of repairing such firearms or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breech mechanisms to firearms. The license fee

The term "firearm" means (1) any weapon, by whatever name known, which is designed to expel a projectile or projectiles by action of an explosive; (2) any part or parts of such weapon; and (3) a firearm muffler or firearm sile ncer.

The term "ammunition" means only pistol and revolver ammunition. It do es not include shotgun shells, metallic ammunition suitable for use only in rifles.

The term "interstate or foreign commerce" means-

- (a) Commerce between any State, Territory, or possession of the United States (not including the Canal Zone), or the District of Columbia, and any place outside thereof:
- (b) Commerce between points within the same State, Territory, or possession of the United States (not including the Canal Zone), or the District of Columbia, but through any place outside thereof; or
 - (c) Commerce within any Territory or possession of the United States (including the Canal Zone), or the District of Columbia.
- 2. The application shall be properly signed by the applicant.
- 3. Penalties are provided for the transportation, shipment, or receipt of firearms or ammunition in interstate or foreign commerce by manufacturers and dealers not licensed under the Act.
- 4. Licenser are effective for a period of 1 year from the date of issuance. Applicants operating branch houses are required to secure one license only, but the application shall show the post-office address of each such branch.
 - 5. The license fee should be remitted with the application. Make remittance payable to "Collector of Internal Revenue."
- 6. SPECIAL NOTICE.—The exportation or importation of any arms or ammunition caliber .22 or larger is subject to the requirement of a license issued by the Secretary of State. Application should be made to the Munitions Division, Department of State, prior to export or import.

U. S. GOVERNMENT PRINTING OFFICE 16-50083-4

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U. S. Registry. No. (To be assigned by Collector)	for period from	to June 20	10	
Name		to buile so	18	(Number of stamp or stamps)
Address				(Date issued)
				(Entered on Record (b)
If firm or partnership, give below name and residence of each memb	er; if corporation, give name, residence, and title of each officer		Check de	es or classes covered by application
Name and title	Residence	Class	Annual tax	Description of occupation (See instruction 4 on back)
	6	1 🗆	\$24	
***************************************		2 🗆	\$1	***********************
***************************************	***************************************	∘ 3 П	\$3	
		4 🗆	\$1	***************************************
State your last business or occupation crevious to this anni	ligation giving Address	5 🗆	\$1 .	(Oirspetica)
State your last business or occupation previous to this appl (Name of employer) What is your State professional license or certificate number	lication, giving address, or name and address of en	mployer	(Address)	● (Obrapation)
What is your State professional license or certificate number. What is your State professional license or certificate number, if Application for registry and special-tax stamp is here business or businesses stated or practice engaged in and at it I solemnly swear, or acknowledge, before two witnesses. Subscribed and sworn to before me this	ication, giving address, or name and address of entry, if any Dy made pursuant to sections 3230 and 3231, Intitle location specified. that all of the above statements are true and cordinate the sections are true and cordinate the sections are true and cordinate whether is the section of the section and section are true and cordinate whether is the section of the section and section are true and cordinate whether is the section of the section of the section and section are true and cordinate whether is the section of the section of the section and section are true are true and section are true are true and section are true are true are true and section are true are true are true are true and section are true are t	mployer	(Address) OL	to covere the period indicated above to covere
What is your State professional license or certificate number What is your State store or business registration number, if Application for registry and special-tax stamp is here business or businesses stated or practice engaged in and at a I solemnly swear, or acknowledge, before two witnesses, Subscribed and sworn to before me this 19	ication, giving address, or name and address of entry, if any Dy made pursuant to sections 3230 and 3231, Interest the location specified. that all of the above statements are true and cordinate of the above statements are true and cordinate of the section of the sections 3230 and 3231, Interest that all of the above statements are true and cordinate of signing)	mployer	(Address) OL	m, or, if officer of corporation, give to

16-8816

1. Indicate on this form, in the blocks provided for that purpose, each class in which business will be conducted. 200

2. Where a taxpayer proposes to engage in more than one business or profession, or at more than one place of business, special tax must be paid for each separate business or profession, for each location. (See note.)

3. If the amount of tax covered by the application is not in excess of \$0, it may be signed or acknowledged before two

witnesses i stead of under oath.

4. The application must state the exact business or profession in which the applicant is engaged. For instance, an application for class I must state whether the applicant is an importer or manufacturer, or both, and in addition whether the activities for which registered will involve medicinal or nonmedicinal marihuana. An application for class 3 in addition to stating whether the activities will involve medicinal or nonmedicinal marihuana, should state whether sales will be made pursuant to order forms or whether pursuant to prescriptions only. An application for class 4 must state whether a physician (state parenthetically whether regular, homeopathic, eclectic, osteopathic, or chiropractic), dentist, or veterinary surgeon, etc. An application for class 5 must state whether a producer or user of marihuana for laboratory use.

5. Application must be signed by the person desiring registration. The application of a firm must be signed by a member; that of a corporation by an officer duly authorized to act. The names of the real owners must be disclosed, if the business is being carried on under an assumed or trade name or that of a former owner. If the application is that of a partnership, the name of each partner must appear. If the application is that of a corporation, the names of the principal officers must be shown. If the application is that of an institution, the head thereof or of the department wherein marihuana is used must sign the application for registration.

6. An original sworn inventory of marihuana or preparations coming within the purview of subchapter C, Marihuana, chapter 23, sections 2590-2604, Internal Revenue Code, in the

possession of the applicant at the date given on this form must accompany this application, if made for class 3 registrants who do not render returns, or class 4 or 5, the duplicate inventory being retained for inspection by authorized officers. Use blank form 713 for inventory

THIS APPLICATION MUST BE EXECUTED AND FOR-WARDED TO THE COLLECTOR OF INTERNAL REV-ENUE BEFORE COMMENCING BUSINESS. NO INCOM-PLETE APPLICATION WILL BE ACCEPTED BY THE COLLECTOR.

The special taxes imposed are as follows:

Class 1 (\$24 per annum).—Importers, manufacturers, and compounders (persons who import, manufacture, or compound marihuana and preparations).

Class 2 (\$1 per annum or fraction thereof).-Producers (persons who produce, cultivate, plant, or harvest marihuana, except those included within class 5, as set out below).

Class 3 (\$3 per annum).—Dealers (persons who sell or dispense marihuana and preparations).

Class 4 (\$1 per annum or fraction thereof).-Practitioners (physicians, dentists, veterinary surgeops, and other practitioners lawfully entitled to distribute, dispense, give away, or administer marihuana and preparations to patients upon whom they, in the course of their professional practice, are in attendance). With certain exceptions, hospitals, medical and dental clinics, sanatoriums, and other institutions not exempt as public institutions or those coming within the scope of class 5, are included in this class.

Class 5 (\$1 per annum or fraction thereof).—Producers or users for Jaboratory purposes. (Persons not registered in class 1 or 2 who produce or of tain and use marihuana in a laboratory for the purpose of research, instruction, or analysis.)

NOTE .- Persons in class 1 or 2 who have paid special tax for those classes are not required to pay, in addition, special tax in class 3 when selling marihuana of their own production, importation, manufacture, or compounding.



SPECIAL-TAX RETURN

Name			(Stamp number)
	Point many All-		
usiness	Print name, followed by trade name. See pa		(Date of issue)
(Street and number,	or rural route) (City or town)	(County) (State)	(Entered in record 10)
ind of tax stamp	v i		
	(See list on reverse side for designation)		(Year) to June 30, 19
I FIRST APPLICATION.	ing squares the nature of the appli RENEWAL CH (Date)	TANON ON TORINGE (Date)	
NAME OF INDIVIDUAL OWNER OR IF	PARTNERSHIP NAMES OF ALL PARTNERS	Home	
		HORE	ADDR 63
***********************			a to
the second second			

	***************************************	***************************************	
Dollars Cents	I declare under the penalties of	***************************************	
Dollars Cents	I declare under the penalties of special-tax stamp herein applied is specified.	/ porium that the share date	
Dollars Cents	I declare under the penalties of special-tax stamp herein applied f	/ porium that the share date	
Dollars Cents de de Cashin's dest oney Order	I declare under the penalties of special-tax stamp herein applied is specified.	f perjury that the above statement for is to cover only the business inc.	
Dollars Cents de Cashin's death comp Order	I declare under the penalties of special-tax stamp herein applied is specified.	/ porium that the share date	
	I declare under the penalties of special-tax stamp herein applied is specified.	perjury that the above statement for is to cover only the business in (Signed)	

with the amount of the tax, on or before the last day of the month must be certified. which liability is incurred in order to avoid penalties. Checks

LIST OF SPECIAL-TAX PAYERS

MONTELT AND ANNUAL RATES TO JUNE 30	Montaly	ANNUALLY	MONTELY AND ANNUAL RATES TO JUNE 30	MONTHLY	ANNUALLY
Menufacturer of adulterated butter Wholesale dealer—adulterated butter Retail dealer—adulterated butter Manufacturer—process or renovated butter Manufacturer—filled cheese Wholesale dealer—filled cheese Retail dealer—filled cheese Brewer of less than than 800 barrels Brewer of 800 barrels or more Rectifier of less than 800 barrels Rectifier of 800 barrels or more Wholesale dealer in fermented mait liquor	40.00 4.00 4.16% 33.33% 20.83% 1.00 4.58% 9.16% 9.16%	\$500.00 480.00 48.00 80.00 400.00 250.00 12.00 85.00 110.00 220.00 100.00 22.00	Retail dealer in malt liquors (at large) Temporary retail dealer in fermented liquors (malt or vinous). Wholesale liquor dealer. Retail liquor dealer. Medicinal spirits stamp tax. Ritail dealer in liquors (at large). Wholesale dealer in wines. Retail dealer in wines. Wholesale dealer in wines and malt liquors. Retail dealer in wines and malt liquors. Retail dealer in wines and malt liquors. User of not more than 25 proof gallons. User of not more than 50 proof gallons. User of more than 50 proof gallons. Manufacturer of stills. Stills manufactured—for each still.	\$1.83\\\delta\$ 2.20 16.66\\\delta\$\\delta\$\\\delta\$\\delta\$\\\delta\$\delta\$\\delta\$\\delta\$\delta\$\\delta\$\delt	\$22.0 200.0 50.0 50.0 200.0 200.0 200.0 200.0 200.0 50.0 5

INSTRUCTIONS

Special-tax liability is reckoned from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July the tax to be remitted is computed by multiplying the monthly rate stated above by the number of months remaining in the fiscal year. 'If the amount resulting involves a fraction the full cent must be included. Example: A wholesale liquor dealer begins business during September; \$16.66% multiplied by 10 equals \$166.66% or \$166.67, the amount to be remitted.

If application on this form is not filed with the Collector during the month in which the liability began the penalty prescribed by section 3612 (d), Internal Revenue Code, is incurred. On the first line must be entered the name of the actual owner or owners of the

business, followed by the trade name if one is used; if an individual, the surname, followed by the christian name and initials. No application will be accepted nor special-tax stamp issued in a trade name only. Removal of place of business must be registered with Collector of Internal Revenue within 30 days of such removal, or liability to additional tax and penalty will

U. S. GOVERNMENT PRINTING OFFICE

be incurred. File promptly, follow instructions carefully, and avoid delays.

(Revised Feb. 1959) (SEE INSTITUTE OF THE PROPERTY OF THE PRO	L-TAX RETURN (Stamp number)
2. Business (Print name, followed by trade name	(Date of insue)
(Street and number, or rural route) (City or town)	(County) (State) (Entered in record 10
8. Kind of tax stamp (See reverse side, separate form recessary for	each kind of tax) (Month) (Year) to June 30, 19
☐ CHANGE OF OWNERSHIP (Date)	e application: ADDITIONAL UNIT PLACED IN OPERATION. CHANGE OF ADDRESS (Date) FORMER OWNER
NAME OF INDIVIDUAL OWNER, OR IF PART- NERSHIP, NAMES OF ALL PARTNERS HOME ADDRESS	Indicate below number of machines or units for which you are paying this return. File separate return for eachykind of tax.
4	Coin-operated AMUSEMENT DEVICES (any amusement or music machines)
	machines involving element of chance) \$250 esch
	Bowling alleys
	Billiard and pool tables
Deliare Conta	statements are true and correct to the best of my knowledge and be the business indicated above and at the location specified.
Cash* Certified or Cash- ior's Check* Money Order*	Date
*Cross out forms of neverant NOT what	whether individual owner, member of firm, or if officer of corporation, give title)
Make remittance payable to "Collector of In- ternal Revenue." Enter amount in above space.	

INSTRUCTIONS

(For full instructions, see Regulations 59 (1941 Edition), as amended)

Paragraph 1. (a) Under the provisions of section \$267 of the Internal Revenue Code as amended, every person who maintains for use, or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device shall pay a special tax as follows:

(1) \$16 per year with respect to each amusement or music machine operated by means of insertion of a coin, token, or similar object.

(2) \$10 per year with respect to each vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of or entitles a person to receive a prize of a retail value of more than 5 cents if the only prize dispensed is merchandise,

(3) \$100 per year for the period July 1, 1943, to October 31, 1950, \$150 per year for the period November 1, 1950, to October 31, 1951, and \$250 per year beginning November 1, 1951, with respect to each "slot" machine which operates by means of insertion of a coin, token, or similar object, and which by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, of tokens.

The term "coin-operated amusement or gaming devices" does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(b) Under the provisions of section 3268 of the Internal Revenue Code as amended, every person who operates a bowling alley, billiard room, or poolroom, shall pay a special tax of \$20 per year for each bowling alley, billiard table, or pool table. Every building or place where bowls are thrown or, where games of billiards or pool are played, except in private homes, shall be regarded as a bewling alley, billiard room, or poolroom, respectively. No tax is imposed with respect to a billiard table or pool table in a hospital if no charge is made for the use of such table.

Paragraph 2. Special tandiability is reckoned from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July the tax to be remitted is computed by multiplying the monthly rate by the number of months remaining in the fiscal year. If the amount resulting involves a fraction the full cent must be included.

Paragraph 3. If application on this form is not filed with the Collector during the month in which the liability began the penalty prescribed by section 3612 (d), Internal Revenue Code, is incurred.

Paragraph 4. On the first line must be entered the name of the actual owner or owners of the business, followed by the trade name if one is used, but no application will be accepted nor special-tax stamp issued in a trade name only. Removal of place of business must be registered with Collector of Internal Revenue within 30 days of such removal, or liability to additional tax and penalty will be incurred. File promptly, follow instructions carefully, and avoid



Brief Summary of Tax Methods by States

Arizona Total take-out permitted 15%. The state receives 4% of the gross amount, not to exceed \$100, 000 of the daily pari-mutuel pool and 6% of the gross amount exceeding \$100,000 of the daily pool, and 9% of the gross amount exceeding \$100,000 of the daily pari-mutuel pool, and 9% of the gross amount exceeding \$100,000 of the daily pari-mutuel pool, plus the odd cents, by which the amount payable on each dollar wagered exceeds a mutiple of 10c.

Arkansas

Total take out 15%, 5% pari-mutuel to state; \$500 daily license; 10c tax on admissions; breaks to 10c; 33-1/3% of breakage to state, 33-1/3% of breakage to city where track is located.

Culifornia Total take-out 13%; state receives 4% pari-mutuel on first ten million dollars; 5% on next ten million dollars; 6% all over twenty million dollars; employees licenses; law board as part of license fee.

Colorado

Total take out 15%; 10% to associations, 5% to state. All breaks to 10c on the dollar paid to state; license fees.

Delaware

Total take-out 10%; 31/2% to state; \$5,000 per season license; 20c on admissions; breaks to 5c, all to associations.

Florido

Total take-out 15%, divided as follows: 7% to association; 3% and admission taxes to be divided equally between each county after racing commission expenses are deducted; 5% to state for Old Age Benefit; breaks to 5c, all to state for Old Age Benefit.

Illinois THOROUGHBRED: Daily license fees \$500 to \$2,500; tax on admissions 20c; horsemen's license fees; tax on pari-mutuel wagering: racing associations are permitted to withhold as commission 14% (Fairmount Park 15%) of total mutuel handle, plus breakage to 10c, subject to the payment to the state of a tax of 4% and 2% of the total mutuel handle, plus ½ of the breakage. As all April 1st of each year, proceeds from uncashed pari-mutuel tickets sold during the previous year are payable to the State of Illinois for the Illinois Veterans Rehabilitation Fund of the State Treasury. HARNESS: Effective July 1, 1951 privilege tax increased from 14% to 15%—3½% to be retained by the track and 5½% to be remitted to the state. Five per cent of the amount received by the state goes into the Agriculture Premium Fund and 12% of the amount received by the state goes into the Agriculture Premium Fund and shall be divided equally between two races to be held in 1952 called the Illinois State Fair Two-Year-Old Trot and Illinois State Fair Two-Year-Old Pace.

Kentucky

Total take-out 13% (Keeneland 10%); 3% pari-mutuel to state; daily license \$500 to \$2,500; 15c on admissions: breaks to 10c, all to associations.

Louisiana Total take-out 13%; state receives 2% first \$100,000; 5% next \$50,000; 6% next \$50,000; to association.

Total take-out 13%; state receives 2% first \$100,000; 5% next \$50,000; 6% next \$50,000; 10c tax on admissions; license fees and fines. Breaks to 10c, all

Maine THOROUGHBRED: Total take-out 15%; 10% to association and 5% to state; breaks to dime, one-half each to state and association; license fee \$5,000 annually. (1950 was first year of thoroughbred racing in Maine.) HARNESS: 15% tax on all pari-mutuel pools; 9½%, to association; ½% to State Agriculture Stipend Fund; 5% to State General Fund. Breakage to 5c, retained by association; out-ticket balance held by state for redemption 90 days, then balance refunded to association.

Maryland
THOROUGHBRED MILE TRACKS—10% take-out permitted; 4% to state and ½ breakage; license fee \$1,000 per day. COUNTY FAIRS—12% take-out permitted; state receives 1% first \$1,500,000 wagered, 6% all over \$1,500,000, ½ of breakage. HARNESS—12% take-out permitted; state receives 1% first \$2,000,000 wagered, 4½% all over \$2,000,000, all breakage; license fee \$25 per day.

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Appendix B

(Congressional Debates.)

Mossochusetts

THOROUGHBRED—Total take-out permitted 12%; state receives daily handle to \$700,000, 5½%; \$700,000 to \$800,000, 6¾%; \$800,000 to \$900,000, 7¼%; \$900,000 and over, 7¾%; license fee \$600 per day. HARNESS—Total take-out permitted 17%; state receives on daily handle, to \$400,000, 5½%; \$400,000 to \$450,000, 6¾%; \$450,000 to \$500,000, 7¼%; \$500,000 to \$500,000 to \$500,000, 7¼%; \$550,000 to \$600,000, 8¼%; \$600,000 to \$650,000 and over, 9¼%; license fee \$200 per day. FAIRS—Total take-out permitted 17%; state receives 2% of daily handle plus 3½% of any amount over \$65,000 handled daily; License fee \$50, per day.

Michigan

11% take-out (THOROUGHBRED: 6% to associations, 5% to state). (HARNESS: 9% to association) 2% to state); breaks to the dime, split equally. License fee, \$500 in city area, \$100 otherwise.

Nebrosko

All profits must be expended for improvement of grounds of association or for payment of premiums for livestock shows conducted by association. For this reason, state takes no pari-mutuel tax, a percentage of breaks nor any other taxation, with the exception of 15% on all paid admissions in counties of a certain size (Ak-Sar-Ben only); daily license fee \$200 (fairs \$15-\$50). No pari-mutuel system allowed except for Thoroughbred racing.

New Hompshire

THOROUGHBRED: 111/2% take-out, plus breakage, with 5% and 1/2 breakage to state; 61/2% plus 1/2 breakage to association. No license fee, but a bond not exceeding \$50,000, is required. (HARNESS: 15% take-out, with 10% to association). Breaks to 10c; one quarter of 1% of pari-mutuel pools allocated among agricultural fairs of state in accordance with competitive or educational premiums paid.

New Jersey

THOROUGHBRED: 12% take-out, with 6% to state and 6% to association up to \$40,000,000. Above that, 7% to state and 5% to track. State receives all the breaks, all fines, under-pay and all monies held for outstanding winning tickets uncashed at expiration of statutory 60-day holding period. HARNESS: 16% take-out, with 6% to state and 10% to track. Breaks to 10c, all to association. All under-pay to the state, all outstanding tickets to state, all fines to the U. S. Trotting Association.

New Mexico

15% total take-out. 15% of total plus breakage retained, with one-third of this amount going to purses, or 5% of each pool. Association pays to state 1/2 of 1% of gross pool in taxes, also a daily license fee of \$50 per dayland 10% of the net amount retained on admissions.

New York

15% take-out; breaks to 5c. FLAT RACING: \$25 per day license fees; 15% tax on admissions; 60% breaks to state; 6% pools to state; 5% pools to municipalities; Saratoga same except 5% pools and 50% breakage to state. HARNESS: \$100 per day license fees. Of 15% take-out, state receives of the total daily pool 5% on first \$200,000; 6% from \$201,000 to \$550,000; 7% all over \$550,000. Breakage 1/2 to state.

Ohio 10% total take-out; state receives 10% first \$1,000; 15% next \$4,000; 20% next \$5,000; 22% next \$5,000; 30% over \$20,000. Breaks to 10c, all to association.

Oregon Option 1—Total take-out 121/2%; state receives 3% on first \$66,000; 4% on next \$67,000; 5% on next \$67,000; 6% on all over \$200,000 wagered any one day; \$25 daily license; breaks to 5c; all to association. Option 2—Total take-out 15%; state receives 5% on first \$133,000; 6% on next \$67,000; 7% or all over \$200,000 wagered in any one day; license fee \$100 a day; breaks to 5c, all to association. All Fair Meets, license fee \$1.00 for the meet under Option 1. or Option 2; breaks to 5c, all to association

Rhode Island

Total take-out 131/2%; state receives 7%, association 61/2% of total amount wagereds treakage divided equally between state and association; breaks to 10c.

South Dakota

Total take-out 12%; 3% to state; 9% to association; \$15 per day license fee; breaks to 10c, all to association.

Washington

15% take out, with 5% to state; breaks to 5c. all to association.

West Virginia

12° take-out, with 3% to state; 9% and breakage to dime to track; uncashed tickets redeemable from racing association one year and redeemable from commission following year, after which funds not claimed revert to state; daily license fee for tracks less than one mile, \$250, and for tracks one mile or over, \$500.

Racing Days, Attendance by States — 1951

State.			-RACING		-		ATTE	NDANCE-	
	Total.		oughbred.	Harness.	Fairs.	Total.	Thoroughbred.	Harness.	Fairs.
Arizona	107 .		87		20	294,645	268,206		26.4
	30		30			211.805	. 211,805	,	20,1
California			274	68	72	4.820,454	4.020.681	351.243	448,5
			57			225.277	225,277		,
*Delaware	76		32	44		427,482	368,644	58.838	
Florida	162		162			1,339.485	1.339.485	30,030	
*Illinois			234	140		3,121,893	2,413,494	708.399	
*Kentucky	119	."	85	34	****	587,318	587,318	no record	
Louisiana			76 - 0		. 1	406.939	406,939		
Maine,	182	Au.	56	126		217,456	217,456	incomplete	
	230		100	80	50	1,778.173	1,078,173	400,000	200
			60	• 49	36	1,372,468	735,725	243,573	300,0
Michigan	241		112	129		1,774,212	1.226.017	548,195	. 393,
Nebraska			80	1.0		+367,779	367,779	340,133	
New Hampshire			54	6	. 1	536,340	536.340	incomplete	4 4
New Jersey	165		141	24		2,037,340	1,996,451	incomplete 40.889	4 91-11
New Mexico	50	_ ,	50			83,539	83,539	40.003	
New York	636		197	439		8.604.987	4.386,315	4 210 672	
Ohio	432		224	128	80 -	1.175.730	915,841	4.218.672	11 44
Oregon		,	55		32	210,000		259,889	no reco
Rhode Island			108			1.186,173	151,000		59,0
South Dakota			19				1,186,173		- 1111
Washington			92			274,128	no record		* 1100
West Virginia	172		172	Α .	•	1811.106	274.128		
		-				1011.106	811,106		
Grapd total		2,	557	1,267	290	31.864.729	23,807,892	6,829.698	1,227,13

^{*}Flat racing and harness racing under jurisdiction of separate commissions. †Estimated.

		PARI-MUTUEL	TURN-OVER-	0		DEVENUE	-	
State.	Total.	Thoroughbred.	Harness.	Fairs.	Total.	Thoroughbred.	TO STATE	
	\$ 6,729,096		\$	\$ 460,929	\$ 322,051	\$ 299,005	Harness.	Fairs.
	,000,000	11,000,556	- sergene	********	694,080	694,080		\$ 23,046
California	,	263,008,283	20,475,350	18,807,916	16,558,861	14,876,125	002 450	770'070
Colorado	9,723,423	9,723,423	*********		650,236	650,236	903,458	779,278
*Delaware	30,352,503	27,667,493	2,685,010	********	1,148,351	1,047,091	* *********	*********
Florida	113,358,668	113,358,668		*********	9,814,558		101,260	*********
*Illínois	171,374,244	147,753,830	23,620,414	**********	11,414,566	9,814,558	**********	
*Kentucky	31,561,133	29,773,874	1,787,259	·	964,147	10,128,816	1,285,750	********
, Louisiana	16,614,392	16,614,392				910,529	53,618	
Asidaine	10,710,723	6,867,539	3,843,184		717,790	717,790	4	
Maryland	115,029,807	79,626,178	19,487,260	15 010 200	596,587	404,108	192,479	**********
Massachusetts		48,149,030 6	6,696,118	15,916,369	5,495,366	3,886,989	898,240	710,137
Michigan	90,941,466	66,330,429	24,611,027	3,803,485	3,811,950	3,209,340	425,250	177,360
Nebraska	14,465,494	14,465,494			4,451,515	3,758,151	693,364	
New Hampshire	37,046,303	36,855,103	404 200		48,453	48,453		
New Mexico	188,684,295		191,200	********	2,068,323	2,077,049	11,274	
New Mexico	5.089.815	186,660,867	2,023,428	,	14,660,260	14,536,432	123,828	*********
*New York	536,200,513	5,089,815	******		34,851	34,851		
Ohio		345,292,092	190,908,421	*********	35,074,565	23,014,367	12,060,198	*********
- Oregon	50,643,600	44,083,481	5,983,452	576,667	1,069,155	968,986	. 90,676	9,493
Rhode Island	6,036,266	5,117,716	ericanie a	918,550	298,926	268,663		30,263
	76,713,196	76,713,196			5,469,102	5,469,102	9.	30,203
South Dakota	415,740	416,740	*********	***************************************	13,146	13,146	**********	*********
	13,597,744	13,597,744	*********		691,814	691,814		*******
West Virginia	36,604,200	36,604,200			1,161,911	1,161,911	********	********
Grand total	1,933,834,349	\$1,591,038,310	\$302,312,123	\$ 40,483,916	-		********	
DEMARKS FLORIDA MALLA			,	4 40,403,310	\$117,250,564	\$ 98,681,592	\$ 16,839,395	\$ 1,729,577

REMARKS—FLORIDA: Not included in above figures are four extra days allowed the State Board of Control Scholarship Fund—total attendance 22,766, total parimutuel \$1,699,110. ILLINOIS (Thoroughbred): 234 days allotted—two races only on November 6, 1951; no racing on November 7 and November 8, 1951 due to snow and
prevailing low temperatures. KENTUCKY: Tax-free admissions at Churchill Downs included in attendance figures. NEW HAMPSHIRE: Harness racing is just one feature
of Fair Meeting and no attendance figures available. NEW YORK (Flat Racing): Figures include one day amateur bunt meet; attendance excludes track staff admissions.

430

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70

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STATE OF NEVADA



NEVADA TAX COMMISSION

Carson City, Nevada



R. E. CAHILL Secretary

July 25, 1952

Mr. Jacob Kossman Attorney at Law 1325 Spruce Street Philadelphia 2, Pa.

Dear Sir:

Reference of your letter of July 10, 1952, concerning the number of bookmakers operating in Nevada prior to and subsequent to the enactment of the 10% tax on such operations.

Our records reflect that there were twenty-six race horse books operating in the State prior to the enactment of the tax. There are now five such establishments in Nevada.

There are no lottery operations in the State. Such operations being prohibited by Statute.

Very truly yours,

NEVADA TAX COMMISSION
/s/ WILLIAM G. GALLAGHER,
WILLIAM G. GALLAGHER,
Supervisor
Gambling License Division

WGG: ac

THE EVENING BULLETIN, PHILADELPHIA, WEDNES-DAY, SEPTEMBER 10, 1952, P. 33.

"New York, Sept. 10—(AP)—With a fall term of racing yet to come and figures far from complete, a preliminary survey of attendance and betting at the Nation's major tracks today showed a fantastic gain as compared with 1951.

"The thoroughbred racing sport is riding along on its biggest boom since the plush post-war years when the jingle around the pari mutuel windows hit record proportions.

"An Associated Press compilation from the 24 racing states disclosed betting is up at every one of the tracks, by

from 8 per cent to 67 per cent.

"The biggest pari-mutuel betting year in the Nation's racing times came in 1946 when the mutuel machines handled \$1,830,287,455. Last season the AP nationwide survey showed \$1,629,777 wagered, an increase of 17.01 per cent over 1950.

"Attendance totaled 24,302,020 in 1951, a gain of 6.01 per cent over 1950, and revenue to the states reached a record \$99,927,423.

"Track officials give various explanations for this year's upsurge. One, the crackdown on illegal bookmaking following the Kefauver Committee hearings; two, an increasing public confidence in the sport, through efforts of the Thoroughbred Racing Protective Bureau to rid racing of the crooked element.

"Whatever the reason, tracks still operating or with race meetings still to be held are reaping the golden harvest.

"The upsurge was indicated for the Nation as a whole when the Florida, California and Louisiana winter tracks did a land office business. It carried through to the northern tracks.

"Bowie, which raced its spring meeting at nearby Laurel, Md., posted a 47 per cent boost in attendance and a whopping 67 per cent jump in mutuel play.

Atlantic City, still operating, reports attendance up 39 per cent, betting up 29. Upstate Saratoga Springs, N. Y., broke all records with the handle up 17.7 per cent, attend-

ance 8.5 per cent.

"Hollywood Park (Calif.) closed its session with betting up 16 per cent. Del Mar, on the West Coast, also is breaking records. Wagering at Golden Gate Fields (Calif.) was up 37, attendance 30 per cent.

"Narragansett, Lincoln Downs, Suffolk Downs, Rockingham in New England reported boosts up to 18 per cent in

betting, 12 in attendance."

THE EVENING BULLETIN, PHILADELPHIA, FRIDAY, NOVEMBER 14, 1952,

JERSEY TRACKS NET STATE \$17,658,477.

Trenton, N. J., Nov. 14—State Treasurer Walter T. Margetts, Jr., today reported the State Treasury has been enriched by \$17,658,477.09 from pari-mutuel betting at the State's three race tracks this year.

The amount represents an all time record as total bets placed on horses reached \$228,533,669, an increase of 22,5 per cent over last year. Last year the State received revenues totaling \$14,420,595.05 from racing.

Attendance at race tracks this year was up 22.1 per cent. Visiting the tracks were 2,447,319 persons, compared with 1.996,451 last year.

Monmouth Park Race Track produced \$5,489,667.29 for the State, while the Atlantic City race track turned in \$5,363,096.55. Garden State Park, near Camden, turned \$6,825,713.25 into the State Treasury.

HORSE RACING.

	NO. OF DAYS	NO. OF DAYS
	IN SPRING.	IN SPRING
Churchill Downs,	MEET-1951	MEET-1952
Kentucky	19	19 4
	PARI-MUTUEL	PARI-MUTUEL
	HANDLE—1951	HANDLE-1952
	\$13,201,405.	\$15,504,747.
Keenland Spring	NO. OF DAYS	NO. OF DAYS
Meet, Kentucky	IN 1951	IN 1952
	11	11
	PARI-MUTUEL	PARI-MUTUEL
	HANDLE—1951	HANDLE—1952
	\$3,252,933.	\$4,023,839.

These figures supplied by the Kentucky State Racing Commission, P. O. Box 1027, Lexington, Kentucky.

HORSE RACING.

NO. OF DAYS IN 1951 c.

NO. OF DAYS IN 1952

Eastern Racing Assoc. Inc., Suffolk Downs, Boston, Mass.

60 PARI-MUTUEL HANDLE—1951

60 PARI-MUTUEL

HANDLE—1952 \$54,079,767.

These figures supplied by the State Racing Commission of the Commonwealth of Massachusetts, 1010 Commonwealth Avenue, Boston 15, Massachusetts.

\$48,149,030.

DOG RACING.

NO. OF DAYS IN 1951

NO. OF DAYS IN 1952

Massasoit Greyhound
Assoc., Inc.,
Raynham Park,
Raynham

44 "

44

PARI-MUTUEL HANDLE—1951 \$8,200.971.

PARI-MUTUEL HANDLE—1952 \$8,708,549.

These figures supplied by the State Racing Commission of the Commonwealth of Massachusetts, 1010 Commonwealth Avenue, Boston 15, Massachusetts.

(97 CONG REC 12237-12239.)

"MR. HUNT: One more question. I refer to paragraph (d), the next sub-section: (d) Persons liable for tax: Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

What I want to know is how it will be possible to get all these gamblers registered in 47 of the 48 States where it is illegal for them to gamble.

MR. KEFAUVER: Undoubtedly it will simply drive them underground. They are not going to sign a death warrant voluntarily. This would be the first time I know that the Federal tax-collecting system is taken off a voluntary basis and it becomes necessary for Treasury agents to find 3,000 policy runners in a particular city or 7,000 in another city, chase them down, get them to pay their \$50 occupational tax, and then see that they pay 10 percent of the amount of money they take in. In my opinion, the provision is impossible of enforcement.

MR. HUNT: One more question, if I may. I read from paragraph (b) on page 254, as follows: (b) Where any tax-payer lays off part or all of a wager with another person who is liable for tax under this subchapter on the amount so laid off, a credit against the tax imposed by this subchapter shall be allowed, or a refund shall be made to, the taxpayer laying off such amount.

The Senator from Tennessee knows from his splendid work in the committee he so ably headed that every

day thousands upon thousands of lay-off bets are made in the United States. I should like to know how a record is going to be kept of every lay-off bet.

MR. KEFAUVER: I would say to the Senator it would be absolutely impossible to do it. We will say that a bet is placed with Carroll in St. Louis, where he is taking thousands of bets a day, and that he lays off 50 percent of that bet with Rosenbaum in Cincinnati, or across the river from Cincinnati, and Rosenbaum lays off a large part of it in New York. To trace transactions of that sort would be a hopeless task; and would require more revenue agents than ever could be found anywhere. I say to the Senator that it is a bad practice to put a law on the books that simply cannot be enforced. That causes, as we all know, disrespect for the Treasury Department, the Internal Revenue Bureau, and on the whole, the Federal Government. This law would simply not be enforceable.

MR. HUNT: I should like to make a brief observation.

Mr. President, I sincerely believe that, first, this is an absolutely unenforceable title in this bill, and, secondly, I disagree with it strongly because I believe that it lends to the gambling element a respectability and license to do business, with the approval and O. K. of the Federal Government, which I do not think they should have.

MR. KEFAUVER: Mr. President, I simply wish to say in conclusion that there is some difference between a tax imposed on an operation of a slot machine and the special tax that is imposed on doing a certain type of business. As to a slot machine, at least we have an instrument which is a physical thing, that is to be operated. But here we get away from a physical thing in being. Even a tax on liquor is a tax on something that is there, that is material. And the same thing is true of a slot machine.

MR. KERR: Mr. President, will the Senator yield for a question?

MR. KEFAUVER: In a moment; let me finish my thought. But when we get away from that, in this gambling tax we are taxing a thing that has no place of business and no instrument by which its operations are carried on. The tax is on an illegal way of life. To my mind, we should never have gotten into the slot machine phase by a special basis. How far are we going to go? Now we are going to tax and put, at least what is going to be considered in the eyes of the public, a blessing on the operation of a form of vice, the running of lotteries, bookmaking and policy making, the three kinds of gambling that are bleeding the people all over the country, taking money away from the housewives and factory workers. The amount that is taken away from the people in this manner is terrific. How far are we going to go? If we are going to do that, then are we going to start placing a special tax on burglary tools? Would we want to share the tax that would be collected from prostitutes in the operation of prostitution?" Where is the stopping point going to be?

MR. KERR: Mr. President, will the Senator yield for a question?

MR. KEFAUVER: In a moment. Lithink we are going into the type of thing that is not proper for the Federal Government. In my opinion, we are discouraging local people at a time when they need encouragement, instead of discouragement.

Every editorial I have seen from the great press of the Nation—and they know a greal deal about this problem—takes the same position. I happen to have before me editorials from two of the leading Washington newspapers. This is what the Washington Post of the other day said about it:

An attempt to force gamblers to share their gains with the Government is not only morally indefensible, but the tax itself would probably not yield a great deal of revenue.

I read the last paragraph of the same editorial:

In short, a Federal tax on gambling imposed for the sake of revenue would be no deterrent to tax enforcement of anti-gambling laws at the local level. On the contrary, imposition of that tax would tend to discourage local enforcement efforts by creating the impression that the Federal Government was disposed to condone illegal gambling activities in its search for more revenue.

Let me read two of the last paragraphs of the editorial in the Washington Evening Star on September 10. I read in part from the editorial:

The Bureau is said to have estimated that at least 3,000 additional agents, trained in criminal-type investigation work, would be needed to enforce the excise and occupational taxes.

Let me say at that point that in my opinion 3,000 would not be one-tenth of the number required, if we were actually to enforce the law and ferret out the transitory bookmakers who are here today and gone tomorrow. They know that if they register they will be signing their death warrants. I think it would require an army of 30,000 to 40,000 special agents. Unless we are to enforce the law, there is no use in enacting it. It would only create disrespect for the Government.

Quoting further from the Star editorial:

Such a force would be encroaching on a field hitherto reserved for local law enforcement agencies. Its job would be, first, to determine whether a suspected evader of the gambling taxes actually was engaged in gambling and, second, what his income from that source amounted to. Local police undoubtedly would welcome the invasion of Federal agents into this field, for it would tend to relieve police of a responsibility rightfully theirs.

But the Internal Revenue Bureau never was intended to

become a crime-suppression agency. Congress should give this plan more study than apparently has been given to it to date. In any event, the Bureau could not possibly take on this new burden without a substantial expansion of its present force. If Congress decides to take this drastic step, it should give the Bureau the extra money and staff needed to do the job effectively. Otherwise, the gamblers will benefit from lax enforcement of a Federal law that might encourage lax enforcement of gambling laws at the local level, too.

The imposition of the amendments contained in the substitute, which prevent the charging off of items of operation, would do a great deal toward really eliminating gambling. They would yield many times more than the amount of the proposed tax. The provision which requires the keeping of books would, in my opinion, bring in hundreds of millions of dollars heretofore escaping taxation.

If we can do anything to cut down the amount of racketeering and gambling, if we can continue to give encouragement to the local authorities in their efforts, what
will be the result? The result will be to force money which
would otherwise go to the professional gamblers into legitimate channels of commerce and trade. I think this point
should be understood. Wherever an effort is made with
any degree of success to cut down the amount of big-time
gambling in any community, the sales of legitimate articles
of food, clothing, and other things which the people need
and which are worth while immediately go up. As the
present occupant of the Chair (Mr. Smathers) knows, that
is what happened at Miami and Miami Beach when bigtime gambling was closed there.

Tests have been made in various counties in Illinois and other States. That has been the inevitable result. The Senator from Wyoming (Mr. Hunt) stated several times that when gambling was eliminated in a particular city in Wyoming—I believe it was Casper—immediately the salestax revenue to the State from that particular section in-

creased. So if we can follow a sensible program instead of giving to gambling a quasi-legal status, we shall have a cleaner America. We can get more tax money for the Federal Government, and more for the State governments.

THE PRESIDING OFFICER: The question is on agreeing to the amendment offered by the Senator from Tennessee (Mr. Kefauver).

MR. JOHNSON of Colorado: Mr. President, the amendment proposed by the junior Senator from Tennessee (Mr. Kefauver) would eliminate entirely from the bill the 10-per-

cent tax on gambling.

The Senator from Tennessee has himself estimated that the total amount gambling turn-over in the United States ranges from \$17,000,000,000 to \$30,000,000,000. Therefore, after making allowance for the exemption of pari-mutuel betting and the exemption for games such as cards and dice which are provided by the bill, the Senator's own testimony indicates that the base of the proposed gambling tax will range about \$12,000,000,000 to about \$25,000,000,000 annually, representing a possible tax yield under the 10-percent gambling tax of from \$1,200,000.000 to \$2,500,000,000 a year. It is this very large potential source of new revenue which the Senator's amendment would strike out of the bill. The committee has estimated the yield of the proposed tax at \$400,000,000 a year. As the above figures indicate, this estimate might well prove conservative.

The main concern which has apparently led the Senator to recommend the elimination of the gambling tax is the belief that it will, in effect, sanction the carrying on of gambling activities in violation of State and local laws. The committee did not share this view. Since its inception the Federal income tax has been applied without distinction to income from (llegal as well as legal sources, and it has never been seriously supposed that such application carried with it any implied authorization to carry on illegal activities. No exemption from the Federal liquor taxes is given to bootleg liquor sold in dry States. Moreover, the present tax on coin-operated gambling devices has been applied without regard to whether or not the operation of any particular machine is in violation of State or local law.

No evidence has been submitted which would indicate that such Federal taxation of illegal activities has in any way encouraged the violation of State or local law. The committee's bill conforms to the pattern of the taxes already referred to and imposes the wagering tax without regard to the legality or illegality of the particular transaction. I should like particularly to call to the Senator's attention that the bill specifically provides that payment of either the tax on wagering or the occupational tax on the receipt of wagers shall not serve to exempt any person from any penalties provided under either State or Federal law with respect to engaging in the taxed activities.

Just as the proposed tax does not in any way give Federal authorization to illegal gambling, the bill likewise does not in any way contemplate that the Federal Government will take over the enforcement of State and local anti-gambling laws. The primary purpose of the committee's amendment is to raise revenue, not to encroach in a field which is fundamentally a local responsibility. We are dealing here with a tax bill, not with the criminal code.

Of course, the full, long-range effects of a new tax of this type cannot be predicted with complete occuracy at this time. Substantial compliance with the tax will bring in vast, new amounts of revenue so badly needed at this time. In this regard, it is confidently believed that there will be substantial areas of voluntary compliance with this new tax. On the other hand, where there is willful failure to comply, the Bureau of Internal Revenue will have a powerful new weapon to employ in its enforcement of the tax laws, particularly the income tax, against this racketeering fringe of our population who are thus seeking to evade their full share of the Nation's tax burden. Again, of course,

substantial compliance with the tax will result in a further increase in the betting odds which are already stacked against the individual bettor. Indeed, it may be that the proposed 10 percent Federal bite out of every bet will in the long run convince many bettors that the are playing a losing game. For those who are not so convinced—and there will always be a substantial majority who will not be—the committee's bill will exact a Federal tax for their folly. Thus, it is believed that the proposed tax may represent a far more realistic approach to the gambling problem than would the proposals which would, in effect, attempt to legislate gambling out of existence.

In conclusion, it should be pointed out that commercialized gambling is in the unique position of being a multi-billion-dollar Nation-wide business which has remained comparatively free from taxation by either the State or Federal Governments. This relative immunity from taxation has persisted in spite of the fact that gambling has many characteristics which make it particularly suitable as a subject for taxation. The committee was convinced that the continuance of this immunity is inconsistent with the present need for increased revenue, especially at a time when many consumer items of a semi-necessity nature are being called upon to bare new or additional tax burdens.

The distinguished junior Senator from Tennessee has read from editorials published in various newspapers, and I understood him to say that the newspapers were uniformly in favor of his position. I wish to read an article from the Washington Post of June 27, 1951, written by Shirley Povich. It is one of the best analyses of the whole question which has ever been published. The article reads:

The House Ways and Means Committee, from which all Federal tax legislation stems, has now come up with the bright idea of slapping a 10-percent bite on the gross volume of business of the professional gamblers.

But Senator Kefauver, of Crime Committee fame, views it as an idea that is not quite bright despite the very practi-

cal House motive of tapping the underworld bankroll for an estimated \$400,000,000 a year.

Senator Kefauver's committee, dedicated to driving the professional gambler out of business and thus striking, too, at corruption of civil officials, shrinks at the House's kind of side-swipe at the gambling business. He protests that any such "occupational tax" would be endowing gambling operations with a sort of Federal license and what he calls quasi legislation.

The Ways and Means Committee's approach to the problem, however, is more direct than Mr. Kefauver's, if not quite as noble. Whereas the Senate Crime Committee calls for law enforcement to kill off the pro gamblers, the House's tax attack is more workable and more certain to accomplish the same end.

The Kefauver group exposed police graft in virtually every city it investigated. But the national crime picture was darker and more sinister at the end of the first phase of the committee's work, which laid bare a whole new mess of problems in connection with gambling operations.

His kind of frontal attack on the gamblers has been attempted before, if not with quite the same intensity. But the Kefauver hearings did prove an effective devise in many instances when it got perjury convictions of some gamblers and some city officials. But the difficulty of convicting big shots of being mobsters by trade apparently has not eased since the Department of Justice had to settle for an income charge against the late Al Capone 20 years ago.

To the credit of the Kefauver group, its investigations served to awaken the public conscience to the vastness and realities of mobster rule and their shocking alliance with public officials. But its interim report, aside from developing names and places of crime and corruption, and calling for more honest law enforcement, outlined no effective and at the same time practical program of getting at the gamblers. The Utopia of rigid law enforcement is still somewhere in the distance

But the House of Representatives' tax committee, concerned primarily with developing new Federal revenue in these times of dire need for same, may have unwittingly stumbled onto a better weapon than ever occurred to the Kefauver committee. Gambling may never be law-enforced to death, but there is some basis for belief it could be taxed to death.

Gamblers and mobsters have always had great respect for the Internal Revenue sleuths. They have long been alerted to the fact that income-tax fraud conviction can hit them with the book and are easier to get than gambling or racketeering convictions, most of which are handled on a city,

county, or State level anyway.

. Since the Carone case, the big gamblers have been careful to be honest with the Internal Revenue Department. If they have not paid willingly out of their big profits, they have at least paid as a precaution. But to this date they have never had to contend with anything like a 10-percent tax on their volume of business.

- It is the sort of a tax that, if it doesn't threaten to drive them out of business, offers the kind of temptation that could drive them into the arms of the unrelenting Internal Revenue. The chances are that only the small-fry punks would try to beat the gross-business tax anyway. The big shots know that big-shot gamblers are easily identified, even if gambling convictions are hard to obtain. But the 10-percent volume-of-business tax would strike at the very source. of their revenue, perhaps kill it off.

The bookies, unused to taking any the worst of it, would be certain to pass the tax on to the betting public, which would soon tap out under that additional burden. Right now, in baseball, football, and fight betting, the betting public is taking a beating to start with. There are no more even-money shots. The bettor must lay the bookies 6 to 5 for the privilege of taking his choice on what ordinarily

would be an even-money bet.

In these days of no Federal tax on the bookie's volume,

the bettor on team A must put up \$120 to win \$100 on an even-money shot. If the commissioner's book is balanced, another bettor is wagering the same sum on team B. That's \$240 in bets the bookie is handling. The 10-percent tax would come to \$24. That's deductible from the winner's return. For his \$120, he nets a profit of \$76 on an even-money shot. That figures out to 3 to 2 that he's laying. That's too much.

The bettor wouldn't be able to stand the gaff. And if it is a horse race he's betting instead of a ball game, the State and track are already taking a 16-percent cut out of his mutuel price. The Federal Government's 10 percent is an additional bite. The bookies would have trouble finding clients willing to take that much the worst of it, even in a sucker community. For the gambling business death and taxes could have a new and literal meaning.

Mr. President, with respect to the approach to the problem by the House Ways and Means Committee, I may say that the Senate Finance Committee, after struggling with this matter for several days, finally decided to take the House bill and the House proposal word for word and line for line.

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Office - Supreme Court, U. S.

B'I I B ID

OCT - 6 1952

CHARLES ZIMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1952

No. 167

UNITED STATES OF AMERICA, Appellant,

v.

JOSEPH KAHRIGER, Appellee.

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE

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RICHMOND RUCKER,
Counsel for Movants.

Supreme Court of the United States

OCTOBER TERM, 1952

No. 167

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes James W. Penn, Jessie Lee Barnes, Parnell Wade Barnes, Jesse Campbell, Lewis Fleming, William Lee Glenn, Virginia Johnson, Walter Lee Kiser, Wade Lampkins, Elijah Morgan, and Julius White Cornell, and respectively move this Court, pursuant to Rule 27, paragraph 9, of the Rules of this Court, for leave to file a brief in this case amicus curiae. The consent of the appellant, United States of America, for filing this brief has been obtained and filed with the Clerk of this Court. The consent of the attorney for the appellee was requested but was refused. The interests of James W. Penn, Jessie Lee Barnes, Parnell Wade Barnes, Jesse Campbell, Lewis

Fleming, William Lee Glenn, Virginia Johnson, Walter Lee Kiser, Wade Lampkins, Elijah Morgan and Julius White Cornell, and their reasons for asking for leave to file a brief amicus curiae are set forth below.

Movants are defendants in cases, consolidated for the purpose of trial, involving the validity of the identical act presented in the above entitled cause, said act being Internal Revenue Code, 26 U.S.C.A., Sec. 3285, et seq. These cases have been appealed by the movants from sentences imposed by the United States District Court for the Middle District of North Carolina to the United States Court of Appeals for the Fourth Circuit. On the 19th day of August, 1952, Honorable John J. Parker, Chief Judge of said Circuit Court, signed and entered an order deferring the hearing of the cases of the movants until after the filing of the opinion of this Court in the above entitled case; that six of the above named defendants were sentenced by the Judge of the Middle District Court of North Carolina to the Federal Penitentary.

In order to properly protect their interests, the movants, through their counsel, are desirous of presenting other grounds than those announced by the District Court for the Eastern District of Pennsylvania in declaring the act in question invalid. The movants propose to submit to this Court, if they be granted leave to file an amicus curiae brief, arguments and authority in support of the following questions:

- (1) Disregarding the designation of the act and viewing its substance and application, the Court will find the act is a penalty for violation of state law and, therefore, invalid as beyond the limit of federal powers to enact.
- (2) A license denotes authorization; therefore, the attacks made upon a similar act in the License Tax Cases (5 Wall 462, 18 L. Ed. 497), although rejected there, should, it is submitted, have been sustained.
- (3) Sound public policy dictates that the processes of the court should not be employed to enforce the provisions of the act, because the end sought to be attained thereby does not justify the reprehensible means.
 - (4) The act is invalid because its inquisitorial provi-

sions violate the Bill of Rights enumerated in the un reasonable search and seizure clause of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment.

With, perhaps, the exception of the first question mentioned, the movants entertain serious doubt that the other questions will be submitted for consideration of the Court. Accordingly, this Court will thereby be deprived of additional authority and argument calculated to sustain the District Court of Pennsylvania in declaring the Act invalid.

It is submitted that a sound public policy is involved in the case before the Court—a public policy that raises the question as to whether or not the processes of the Court should be employed to attain an end regardless of the means, as well as the freedom of at least six defendants. Manifestly, the interests of these movants will be greatly impaired and jeopardized without representation before this Court.

Therefore, we strenuously urge the Court to grant us permission to file amicus curiae brief and to argue the case orally before the Court.

Respectfully submitted

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DATED: September 26, 1952

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Supreme Court of the United States

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BRIEF OF AMICI CURIAE

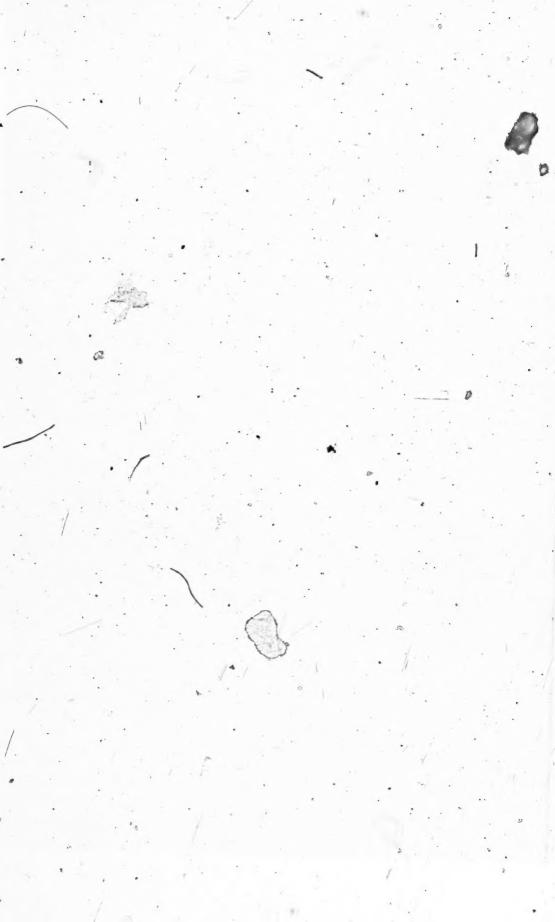
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NOVEMBER 24, 1952



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 167

UNITED STATES OF AMERICA, Appellant,

v.

JOSEPH KAHRIGER, Appellee.

BRIEF OF AMICI CURIAE

This brief is filed by counsel who represent eleven negro defendants, who were convicted in the United States District Court for the Middle District of North Carolina for failure to pay Wagering Taxes provided for under the WAGERING TAX ACT (26 U.S.C.A. 3285 et seq.).

Six of these defendants were sentenced to the federal penitentiary and five of them were fined.

These defendants' cases are now pending in the United States Court of Appeals for the Fourth Circuit, the hearing having been stayed until the determination by this Court of United States of America v. Kahringer.

Permission has been granted these defendants by this Court to file this brief.

STATEMENT OF QUESTIONS INVOLVED

(1) Disregarding the designation of the Act and viewing its substance and application, the Court will find the

Act is a penalty for violation of state law and, therefore, invalid as beyond the limit of federal powers to enact.

- (2) A license denotes authorization; therefore, the attacks made upon a similar act in the License Tax Cases (5 Wall. 462, 18 L. Ed. 497), although rejected there, should, it is submitted, have been sustained.
- (3). Sound public policy dictates that the processes of the court should not be employed to enforce the provisions of the Act, because the end sought to be attained thereby does not justify the reprehensible means.
- (4) The Act is invalid because its inquisitorial provisions violate the Bill of Rights enumerated in the Unreasonable Search and Seizure Clause of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment.

Argument

(1) DISREGARDING THE DESIGNATION OF THE ACT AND VIEWING ITS SUBSTANCE AND APPLICATION, THE COURT WILL FIND THE ACT IS A PENALTY FOR VIOLATION OF STATE LAW AND, THEREFORE, INVALID AS BEYOND THE LIMIT OF FEDERAL POWERS TO ENACT.

The marked likeness between the measure (Rev. Act 1926, sec. 701), condemned by this Court in the case of *United States v. Constantine*, 296 U.S. 287, 80 L Ed. 233, 54 S. Ct. 233, and the one presented in this case (October 20, 1951, 65 Stat. 529, Int. Rev. Act 1951, sec. 471 (a), 26 U.S.C., secs. 3285-3298, inclusive) is made abundantly clear, in the able opinion of the Trial Judge. Viewing the substance and application of these acts, one is forced to the conclusion that both constitute a penalty for the violation of state law.

In the Constantine case, supra, heavily relied upon by the Trial Court, Mr. Justice Roberts, in his keen analysis of the statute there encountered as well as its application to the facts involved, leaves no uncertainty as to the position of the Court respecting the validity of the Act. We quote from the identical

passages from that case, as did the Trial Judge, as follows: (296 U.S. at page 294):

"In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it, and we must ascribe to it the character disclosed by its purpose and operation, regardless of name. Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of State law, and as such beyond the limits of federal power.***

(page 295)

"The condition of the imposition is the commission of erime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue. Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct.

"We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of State law as such are too strong to be disregarded, remove all semblance of a revenue act, and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the States, reserved from the grant of powers to the federal government by the Constitution.

"We think the suggestion has never been made—certainly never entertained by this Court—that the United States may impose cumulative penalties above and beyond those specified by State law for infraction of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications

from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of State concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives.***

(page 296)

"Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a State law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police power of the State."

An analysis of the statute here involved (October 20, 1951, 65 Stat. 529, Int. Rev. Act. 1951, sec. 47 (a), 26 U.S.C. secs. 3285-3298, inclusive) discloses even more clearly indicia of a penalty than appear in the Constanting case, supra. For here, in addition to exhorbitant penalties of not less than One Thousand Dollars (\$1,000.00) for failure to pay taxes (sec. 3294), the applicant for registration, among other requirements, must give the name and place of residence of each person who is engaged in receiving wagers for him or on. his behalf, etc. (sec 3291). Moreover, as stated by the Court below: "Failure to give this information and to comply with the law in certain respects would subject the applicant to a fine of Ten Thousand Dollars (\$10,000.00) and imprisonment of five (5) years." Therefore, taking into account that here, as in the Constantine case, the doing of the act for which the purported license tax was exacted, constituted an infraction of the state criminal law, the Court should have no difficulty in concluding that the principle so convincingly expounded in the

above-quoted excerpt from the opinion of Mr. Justice Roberts should, for all the more reason, invalidate the stature here, as it did in the Constantine case. Moreover, as observed in an excellent comment of the Constantine case, appearing in 84. U. of Pa. L.R. 663, ... the Court's decision was in accord with the principle of the precedent Child Labor Tax Case [259 U.S. 20, 66 L. Ed. 817, 42 S. Ct. 449] and the subsequently decided A.A.A. case [United States v. Butler, 297 U.S. 1, 80 L. Ed. 477, 56 S. Ct. 312], that Congress may not by its taxpower, encroach upon the state police power."

In the Child Labor Tax Case, supra, the Court was confronted with the validity of the Child Labor Tax Law (Feb. 24, 1919, 40 Stat. at L. 1057, 1138, Chap. 18, Comp. St. 6336 7/ 8a, under title "Tax on Employment of Child Labor," secs. 1200-1208, inclusive). This law undertook to impose a socalled tax of 10% upon an employer who during a portion of the taxable year knowingly employed a person within the age limits therein proscribed, With only one member of the Court dissenting, the Act was declared unconstitutional. Mr. Chief Justice Taft, in an opinion characterized by its strength and clearness, forcefully demonstrated that Congress under the guise of a taxing measure had in fact encroached upon the prerogative reserved to the states, in violation of the 10th Amendment to the Constitution of the United States. The opinion reflects that the Court is fully aware of the seriousness of the extraordinary duty of having to invalidate an act of Congress; at the same time the opinion reflects that such duty is not to be avoided, where as in that case, as in the instant case, the substance of the legislative enactment - as distinguished from its form-points unerringly to the conclusion that Congress has infringed upon the power of the several states.

The subsequent decision, one of far-reaching importance, adverted to in the law review comment (84 U. of Pa. L.R. 663), United States v. Butler, 297 U.S 1, 80 L. Ed. 477, 56 S. Ct. 312, is also apposite to the question under discussion. In that case certain provisions of the Agricultural Adjustment Act, 1933, (Chap. 25, 48 Stat. ct. L. 31, title 7, U.S.C.A. sec. 601) were condemmed as being in contravention of the powers reserved to the states. Once again under the guise of taxation,

Congress had transgressed upon matters of state concern. Heavy reliance was placed by Mr. Justice Roberts in that case on the decisions both of the Child Labor Tax Gase, 259 U.S. 20, 66 L. Ed. 817, 42 S. Ct. 449 (supra) and of United States v. Constantine, 296 U.S. 287, 80 L. Ed. 233, 54 S. Ct. 233. A striking application of the principle involved in all of these cases, including the case at bar, was made by Mr. Justice Sutherland, in United States v. La France, 282 U.S. 568, 75 L. Ed. 551, 51 S. Ct. 278, as follows (282 U.S. at page 572):

"No mere exercise of the art of lexicrography can alter the essential nature of one act or thing; and if an exaction be clearly a penalty it cannot be converted into a tax. by the simple expedient of calling it such. That the exaction was in question or not a true tax, but a penalty involving the idea of punishment for infraction of the law, is settled by Lepke v. Lesbren, 259 U.S. 557, 561, 66 L. ed. 1061, 1064, 1065, 42 S. Ct. 549."

Applied to the measure before the Court (October 20, 1951, 65 Stat. 529, Int. Rev. Act 1951, sec. 471 (a), 26 U.S.C. sec. 3285-3298, inclusive) the principle, so ably expounded in that case, conclusively establishes the invalidity of this Act. As in United States v. La France, 282 U.S. 568, 75, L. Ed. 65 Stat. 531, 551, 51 S. Ct. 278, the Act is designated a tax (Wagering Three, 26 U.S.C.A., sec. 3285, et seq.) And as in the La France case, in the subsequent provisions the labels "tax" and "taxes" are employed. Likewise, as in the La France case the "essential nature" of the Act is a penalty. This conclusion is inescapable, even from a cursory reading of the Wagering Tax Act. In addition to the indicia of a penalty, hereinabove indicated, the provision under "miscellaneous" (sec. 3297) with reference to applicability of federal and state laws manifests a desperate effort on the part of the draftsman to insulate the Act against an anticipated storm of attack based. upon its distinct penal character.

Nor are such cases as United States v. Doremus, 249 U.S. 86, 63, L. Ed. 493, 39 S. Ct. 214, and Sonzinsky v. United States, 300 U.S. 506, 81 L. Ed. 772, 57 S. Ct. 554, in conflict with the position here taken. In those cases the tax laws involved were in truth and in fact revenue measures. And as such were recog-

nized by the Court. The opinions of the Court in each of those cases were lucid with regard to the power of Congress in the legitimate sphere of taxation and prohibited sphere of regulation of matters reserved to the states.

The decision in United States v. Sanchez 340 U.S. 42, 71 S. Ct. 108, 95 L. Ed. 47, presents, at first blush, a seemingly complete reversal of principles heretofore emphasized and applied by the Court, as in all of the cases hereinabove cited. Upon a closer inspection, however, it will be found that the Marihuana Tax Act (Int. Rev. Code sec. 2590 (a) (2)), there involved, while attended by some of the attributes of a penalty similar to the Act here in question, is distinguishable as its object is primarily to raise revenue. Explicit in this statement of the Court in that case is the unequivocal determination that the effect of the legislative enactment was a valid exercise of the taxing power—the regulatory provision being merely collateral (340 U.S. at page 45):

"The tax in question is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect." (italics supplied)

Hence another statement of the Court susceptible of a different interpretation, hereinafter alluded to, constitutes mere dictum. As the government prevailed in that case and inasmuch as there is some resemblance in the provisions of the Act there encountered with the one before the Court, we anticipate heavy reliance will be placed upon that decision by the government in the presentation of this case. Accordingly, we make a few additional observations concerning that decision.

The Act, as here, was declared invalid by the Trial Court, and, as here the government appealed to this Court. On the appeal in that case, the respondent was not represented by counsel. The government apparently had no opposition. Inasmuch, as the Act in the Sanchez case constituted a revenue measure, as above noted, the opinion of the Court stating "the revenue purpose of the tax may be secondary" is obviously dictum. Furthermore, as disclosed in an unusually penetrating analysis made of that decision in 36 Nowa L. R. 699, this statement of the Court was a complete departure "from the limitation

always recognized, if not seriously adhered to" in cases of this nature.

And as further brought to light in the law review comment (36 Iowa L. R. 699 at p. 700), theithree cases cited by the Court in support of its hypothesis are inapposite thereto. The first of these cases, Hampton & Co. v. United States, 276 U.S. 394, 72 Ed. 624, 48 S. Ct. 348, concerned the Tariff Act of 1 22 (19 U.S.C. sec. 154). Drawing upon the comment, we quete (p.700): "...the case presented no serious constitutional issue as to the power of Congress to regulate the activity involved in view of the plenary power of Congress to regulate foreign commerce." The second case, Sonzinsky v. U.S., 300 U.S. 506 81 L. Ed. 772, 57 S. Ct. 554, upheld the national Fire Arms Act of 1934 (Int. Rev. Code, sec. 1132), the Court finding, as above indicated, that the effect of the measure was a tax, not a regulation. In A. Magnano Co. v. Hamilton, 292 U.S. 40, 78 L. Ed. 1109, 54 S. Ct. 599 the third case relied upon the Court in the Sanchez case, an excise tax of the state of Washington was sustained. Once more we resort to the law review comment (36 Iowa L.R. 699 at p.700) with reference to the disposition of the Magnano case: (p.700): "...the Supreme Court emphasized that the measure was primarily for revenue despite the collateral regulatory purpose and effect."

Surely the assertion in that opinion amounted to no more than a casualty that occasionally befalls the most circumspect on the bench. In any event this Court has too often demonstrated its ability to extricate itself from the shackles of some ill-advised precedent or pronouncement-made under such conditions as were exhibited in the Sanchez case, where only one party to the controversy appeared before the Court-to be concerned with the rule there announced. Two cogent reasons suggest themselves why the Court should not adhere to such rule: (1) prior opinions of this Court establish the converse of such a rule; (2) sound reasoning supports the precedent. In addition to the cases hereinabove cited, we urge the Court to review the convincing opinion of the Court in Carter v. Carter Coal Company, 298 U.S. 238, 80 L. Ed. 1160, 56 S. Ct. 855. The law review comment (36 Iowa L.R 699) succinctly points out the manifest danger involved in adhering

to such rule (p.701): "Objectives heretofore thought to be beyond the Constitutional power to achieve may yield to adroit use of the plenary taxing power."

Another fundamental distinction between the Marihuana Tax Act and the Wagering Tax Act is that compliance with the former act does not in and of itself expose the tax-payer to the processes of the criminal court, either state or federal; while the compliance with the latter act automatically subjects the tax-payer to the processes of at least the state criminal court.

A didactic passage from the opinion of Mr. Justice Cardozo in *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 81 L. Ed. 1279, 57 S. Ct. 883, presents clearly the underlying distinction between the imposition of a valid tax, such as the Social Security Tax involved in that case and the imposition of an invalid tax as is here involved (301 U.S. at page 591):

"It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is insulated to the fiscal need subserved by the tax in its normal operation, or to any other and legitimately national. The Child Labor Tax Cases were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. U.S. v. Constantine. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternate being approximate equivalents."

Is it not obvious that the imposition of the purported tax before the Court is dependent upon the conduct of the tax-payer? Is it not obvious that the conduct sought to be discouraged (gambling) is unrelated to the fiscal need subserved by the tax in its normal operation? Is the end sought to be reached legitimately national?

It is observed that Mr. Justice Cardozo cited in support of his postulate United States v. Constantine, 296 U.S. 287, 80 L. Ed. 233, 54 S. Ct. 223, which was emphasized, as above indicated, by the Trial Judge in this case. By the same token, therefore, this Court, it is submitted, should have no hesitancy

in affirming the judgment of the lower court in this cause. Accordingly, it is only from a sense of duty to our clients, not to leave a stone unturned, do we seek the further indulgence of the Court in bringing forward other argument in support of the invalidity of the Act in question.

(2) A LICENSE DENOTES AUTHORIZATION; THEREFORE, THE ATTACKS MADE UPON A SIMILAR ACT IN THE LICENSE TAX CASES (5 WALL. 462, 18 L ED 497) ALTHOUGH REJECTED THERE, SHOULD, IT IS SUBMITTED, HAVE BEEN SUSTAINED.

In the License Tax Cases, supra, the principal argument advanced was that the granting of a license to carry on a particular business, a lottery, was a grant of authority to carry it on; that as Congress did not have the power thus to regulate the internal trade of the state, therefore, the authorization was void.

Mr. Chief Justice Chase, in addressing himself to the foregoing attack upon the validity of the Act ir that case makes this astounding assertion (5 Wall, at page 470):

"This series of propositions and the conclusions in which it terminates depends on the postulate that a license necessarily confers an authority to carry on a licensed business but do the licenses required by the Acts of Congress for selling liquor and lottery tickets confer any authority whatever?"

The word license is defined in the Century Dictionary (unabridged) as follows: "To grant authority to do an act which without such authority would be illegal or inadmissible; remove restrictions from by a grant of permission," etc. Consequently, it would seem that violence is done to the common acceptation of the word license by thus depriving the word of its denotation. Nor in making this observation are we losing sight of the fact that words, after all, are merely symbols of thought; that words must be construed in the light of their settings. Bearing this salutory principle in mind, however, we strenuously contend that there was no justification for attributing to the word license such a strange construction as was done in the License Tax Case, supra. Moreover, from the

above quoted portion from the opinion in that ase the implication is apparent that, but for this deviation of the word license from its ordinary use, the arguments advanced by counsel attacking the validity of the act would have been considered meritorious. Accordingly, we incorporate here these able arguments.

We anticipate that the Court shares our view that Mr. Chief Justice Chase in many of his opinions has made substantial contributions to the development of the law, and will, therefore, understand that it was only after due consideration that we felt impelled to criticize his opinion in the License Tax Cases, supra.

Furthermore, we are constrained to believe that the Court will share our view with reference to the meaning and construction of the word license thereby converting the opinion in that case from one in support of the legislative enactment there and here involved to one in opposition therto. Specious reasoning, we submit, would be required to adopt any other course.

(3) SOUND PUBLIC POLICY DICTATES THAT THE PROCESSES OF THE COURT SHOULD NOT BE EMPLOYED TO ENFORGE THE PROVISION OF THE ACT, RECAUSE THE END SOUGHT TO BE ATTAINED. THEREBY DOES NOT JUSTIFY THE REPREHENSIBLE MEANS.

Assuming, for the sake of discussion that the term license does not denote authorization, nevertheless, we respectfully contend that the processes of the Court should not be employed to enforce the provisions of the Act. To say that because the license does not denote authorization the measure is illegal and, therefore, the amounts prescribed are collectible, completely begs the question of public policy. Or to put it another way, the legality of the tax is not the criterion to determine whether or not public policy subscribes to the utilization of the processes of the court for the enforcement of the Act. Fallacious reasoning is necessary to obtain any other result. The regulation of gambling—the end sought to be attained—does not justify the reprehensible means sanctioned by the Act.

Mr. Justice Frankfurter, dissenting in the recent case On Lee vs. U.S.—U.S., 96, L. Ed. (adv.) #16, p. 770 at p. 776, 72 S. Ct. 967, at page 974: epitomizes the underlying principle advanced here by us in vigorous and unmistakable language as follows:

"The law of this Court ought not to be open to the just charge of having been dictated by the 'odious doctrine', as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicality. It derives from a preoccupation with what is episodic and a disregard of long-run consequences. The method by which the state chiefly exerts an influence upon the conduct of its citizens, it was wisely said by Archbishop William Temple, is 'the moral qualities which it exhibits in its own conduct.'

"Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by the 'dirty business' of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet."

One illustration should suffice to make clear the applicability of the foregoing principle to the Act in question.

Surely it would not be seriously contended that the processes of the court could be successfully utilized to permit the loser of a gambling transaction to collect money or property delivered in payment of or on account of the transaction. 24 Amer. Juris., Gaming and Prize Contests, sec. 79, page 445;

Rest. Contracts sec 598; Williston, Contracts (rev. ed.) vol. 5, sec. 1630, et seq. The reason for the denial of such relief was stated by Lord Mansfield in Holman v. Johnson, Cowp., 341, 343, quoted in Williston, supra, section 1630, p.4561: The principle of public policy is this :Ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act," etc. It is to be noted that the fundamental basis of the hypothesis is made to rest upon public policy—not illegality—illegality being merely a classification of a broader concept, public policy.

Does it comport with a sense of good morals to say that while the courts will not enforce the consideration paid in the gambling transaction that they will lend their aid to collect a purported license tax for which the licensee acquires no authorization? Or if any authorization is acquired, the licensee thereby subjects himself to the criminal processes of the state court? Would not a doctrine that would permit the use of a legal process to effect such a recovery be properly classified as an "odious" one? Is not the Act calculated to encourage crime, because the criminal law will be reluctantly enforced against gamblers who have acquired licenses? Is not the Act, therefore, against public policy "as tending to encourage crime and create disrespect for the criminal laws?" Thompson v. Hall, 104 W. Va. 76, 138 S. E. 579. Does not such an act offend "the community's sense of fair play and decency"?

Once more, we appeal to the sound judgement of a Court characterized by its dynamic approach to questions involving, as here, the liberty of the individual—a Court, which has on innumberable occasions sought to safe-guard the fundamental rights of the individuals even at the risk in so doing of a charge of being inconsistent with a former position. A graphic illustration of this forthright and fearless approach to questions concerning personal liberties is reflected in a few words from the dissent of Mr. Justice Douglas in On Lee v. United States,—U.S. 96, L. Ed. (adv.) 770, at page 778, S. Ct. 967, at page 976:

"The Court held in Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 514, 72 L. Ed. 944, over powerful dissents by

Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice Butler, and Chief Justice Stone that wire tapping by federal officers was not a violation of the Fourth and Fifth Amendments***Fourteen years later in Goldman v. United States, 316 U.S. 129, 62 S. Ct. 933, 86 L. Ed. 1322, the issue was again presented to the Court. I joined in an opinion of the Court written by Mr. Justice Roberts which adhered to the Olmstead case, refusing to overrule it. ** I now more fully appreciate the vice of the practice spawned by Olmstead and Goldman. Reflection on them has brought new insight to me. I now feel that I was wrong in the Goldman case." (italics supplied)

As long as members of the Court are disposed to espouse the cause of justice in this exemplary manner, these amici curiae are confident that the Court will conscientiously apply itself to the task of making a careful examination of the Wagering Tax Act (65 Stat. 529) in order to determine whether or not its provisions are in contravention of public policy or of the Bill of Rights, hereinafter discussed, and in doing so will have no difficulty in sustaining the judgment of the Trial Judge.

(4) THE ACT IS INVALID BECAUSE ITS INQUISITORIAL PROVISIONS VIOLATE THE BILL OF RIGHTS ENUMERATED IN THE UNREASONABLE SEARCH AND SEIZURE CLAUSE OF THE FOURTH AMENDMENT AND THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT.

Imperceptibly the shadowy line of demarcation between reasons advanced in support either of public policy or of the Bill of Rights disappears upon analysis. The same fundamental concepts of liberty are encountered from either approach. This postulate is conclusively demonstrated in cases discussed, herein above under public policy. In the interest of time, therefore, we merely incorporate by reference here argument and citation of authority presented there.

At the outset of a consideration of the question as to whether or not the Act violates the Bill of Rights, we emphatically assert that the Court is not called upon to determine or to speculate about the legislative intent in enacting the measure. Irrespective of legislative intent, the practical operation of the Act results in arming the law enforcement officers of Pennsylvania and North Carolina, wherein the respondent and the amici curiae reside, respectively, with sufficient information to indict and convict them for violations of the criminal law. And such officers do in fact proceed to indict and convict on such information. This result inevitably follows; while the operation of the Act as a revenue measure is highly speculative.

It is a matter of common knowledge, and as reflected by numerous newspaper accounts, such as appeared in the issue of The New York Times, page 28, under date of August 2, 1952, the Wagering Tax Act as a means of collecting revenue has fallen far short of expectations and has atterly failed to curb gambling activities. The Senate Crime Investigating Cammittee opposed the passage of this Act (79 Congr. Record, part (9, p. 12231). In addition, it is a matter of common knowledge that the public looks upon the Act with disfavor because of its insidious operation by granting to one, for a consideration, the privilege of performing an act, while subjecting him to punishment for that performance, Such a course of conduct does violence to the public conscience. No tenucus dogma or theory based upon the distinction between jurisdictional spheres of the two sovereignties, federal and state, alters the position of the public about the matter. For a most instructive article roundly condemning the "two sovereignties" theory and disclosing the danger to our liberties in adhering to such a course, see J. A. C. Grant, Self-Incrimination in the Modern American Law, Concurrent Federal and State Juridiction," 5 Temple L. Q. 395. Numerous decisions, some of which are hereinafter referred to, are ably discussed in that article.

To permit the federal government thus to participate in the apprehension of state violators by this nefarious means undoubtedly brings both the federal and state governments into disrepute. This fact in and of itself should suffice to invalidate the Act as being in contravention of a sound public policy. But the Court is not relegated solely to a position of public policy in order to declare the Act invalid, because the Act obviously infringes upon the fundamental rights of those who comply with its terms. Both the Unreasonable Search

and Seizure Clause of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment condemn the Act.

In the celebrated case of Boyd v. United States, 116 U.S. 616, 29 L. Ed. 764, 6 S. Ct. 524, any doubt that existed theretofore as to the inter-dependence of the Search and Seizure Clause of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment was clearly dispelled. It is unnecessary to undertake to amplify upon the actual decision of that case or to cite or comment upon the vast number of subsequent decisions of this Court, affirming the principles so painstakingly and ably set forth therein, except that it might be helpful to advert briefly to one or two cases, notably Weeks v. United States, 232 U.S. 283, 58 L. Ed. 652, 35 S. Ct. 341, which case has also received the subsequent unequivocal approval of this Court, as reflected by numerous opinions.

Mr. Justice Bradley, after addressing himself to the historical background of the two clauses (Search and Seizure Clause of the Fourth Amendment and the Self-Incrmination Clause of the Fifth Amendment), and to the nefarious practices that the Bill of Rights were designed to guard against, placing heavy reliance upon and quoting extensively from Lord Camden's memorable discussion in *Entick v. Carrington*, 19 Howell St. Tr. 1029, has this to say 116 U.S. 616 at page 630°:

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and rummaging of his drawers that constitute the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which inderlies and constitutes the assence of Lord Camden's judgment."

This passage was quoted with approval and applied by Mr-Justice Day in the case of Weeks v. United States, supra, (232 U.S. 283 at page 291).

In Jack v. Kansas, 179 U.S. 372, 26 S. Ct. 73, 50 L. Ed. 234, the danger that testimony given under a Kansas statute (Kans. Laws 1897 c. 265, sec. 10) might incriminate the witness as a violator of federal law, and of the possible use of such testimony in the federal court was considered too unsubstantial and too remote to avail the witness of his priviz lege. While in the case at bar-irrespective of legislative intent—the inquisitorial provisions of the act result in coercing each applicant for license to divulge information that automatically subjects him to the criminal processes of the state court, and the state and federal authorities are actively prosecuting by virtue of these provisions. Upon such conviction, the applicant may be fined or imprisoned, or both, under state law. Can it be successfully maintained that such a practice does not amount to an "invasion of his indefeasible right of personal security, personal liberty, and private property"?

Ballmann v. Fagin, 200 U.S. 186, 26 Sup. Ct. 212, 50 L. d. 433, was decided after the Jack case. There the defendant was found guilty of contempt by the United States District Court for failing to obey an order of court directing him to produce a certain book before a grand jury. Overruling the order of contempt this Court, speaking through Mr. Justice Holmes, said (200 U.S. at p. 195):

"The book very possibly may have disclosed dealings with the person or persons naturally suspected, and, especially in view of the charges that Ballmann kept a bucket shop,' dealings of a nature likely to lead to a charge that Ballmann was an abettor of the guilty man. If he was, he was guilty of a misdemeanor under Rev. Stat. sec. 5209, U.S. Comp. Stat. 1901, p. 3497, and no more bound to produce the book than to give testimony to the facts which it disclosed. Boyd v. United States, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Counselman v. Hitchcock, 142 U.S. 547, 35 L ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

"Not impossibly Ballmann took this aspect of the matter for granted, as one which would be perceived by the court without his disagreeably emphasizing his own fears. But he did call attention to another, less likely to be known. As we have said, he set forth that there were many proceedings on foot against him as party to a 'bucket shop,' and so subject to the criminal law of the state in which the grand jury was sitting. According to United States v. Saline Bank, 1 Pet. 100, L. ed. 69, he was exonerated from disclosures which would have exposed him to the penalties of the state law. See Jack v. Kansas (decided this term), 199 U.S. 372, ante, 234, 26 Sup. Ct. Rep. 73."

Manifestly, if a person commanded by a federal court to give information is excused from so doing because of the probability of his being indicted in a state court; for all the more reason, a federal act demanding such information, which when issued immediately subjects him to the processes of the state criminal court, should be declared invalid.

Nor are we inadvertent of Feldman v. United States, 322 U.S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408, holding that testimony obtained under a state immunity statute is admissible in a federal prosecution. To begin with that case was decided by a bare majority of the Court. Two justices took no part in the consideration of the case and two justices concurred in a vigorous dissenting opinion filed by a third justice. Accordingly, the case as a precedent is not in a strong position. Especially is this true when considered in the light of former decisions of the Court, analyzed in the carefully prepared article by J. A. C. Grant, 5 Temple L. Q. 395, supra, and in a note, "Admissibility in Federal Courts of Testimony Obtained Under State Immunity Statutes, 39 Ill. L. Rev. 184.

Furthermore, the Feldman case is distinguishable from the instant case. The government in that case did not participate as it does here in an inquisition. There was no ear-mark of entrapment involved in the Feldman case. It is not a rash assumption that the state court when it required Feldman to testify in the proceedings did not anticipate that the government would subsequently take advantage of the situation by utilizing his testimony for the purpose of conviction. Precedent

clearly supported such an assumption. See cases cited in 5 Temple L. Q. 395, supra. Moreover it has been suggested that the Feldman case could have been disposed of on the basis of a federal rule of evidence, without reference to the Bill of Rights. VIII, Wigmore, Evidence (3rd ed), sec. 2258, 1951, Supplement, at page 87. As indicated in the Supplement, this observation was an assimilation of the Feldman case to the theory advanced in the parent treatise.

Adverting to the inquisitorial provisions of the Wagering Tax Act, (26 U.S. C. Sec. 3291) we urge the Court to re-read with care the illuminating article by Honorable Edmund M. Morgan, "The Privilege Against Self-Incrimination," 34 Minn. Law. Rev. 1. The historical back ground, therein so painstakingly narrated, irrefutably discloses that it was the design, intent, and purpose of the founding fathers in the Bill of Rights to protect us from just such legislation as is exemplified by this Act. The Unreasonable Search and Seizure Clause of the Bill of Rights is ably treated in 25 Indiana L. Journal 259, "Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?" by Chas. A. Reynard.

As revealed by the cases presented in these articles, there exists some divergency of views among the members of the Court, as well as among the authorities, with regard to theories of constitutional law. Nevertheless, under any theory that may be advocated, the sagacious utterence of Mr. Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L. ed. 579, 601:

"We must never forget that it is a constitution that we are expounding." (italics supplied)

will be found of immeasurable value in solving the particular constitutional question presented—especially in such a case as this one involving the protection of human liberties from inquisitorial methods, comparable with those eminating from the Court of Star Chamber.

In conclusion, we call to our aid the salutory pronouncement found in the last paragraph of the article, in 25 Indiana Law Journal 260 at page 313:

"It is to be acknowledged, of course, that in its handling

of these cases the Court is confronted with the competing demands of two policies, extremely difficult if, indeed, possible to reconcile. On the one hand there is the interest in privacy which history tells us was the principal concern of the Amendment's framers. On the other is society's interest in the suppression of crime—an interest which is obtaining its fair share of public concern as measured by today's headlines. But, 'any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution,' in other words, 'we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose.' In the proposal and adoption of the Fourth Amendment, that choice was made forcus, and if it is found that it has been a poor one, we should resort. to constitutional means to correct it."

We earnestly pray the Court, therefore, in its consideration of this case to bear in mind that by the adoption of the Fourth and the Fifth Amendments the choice between expediency and the protection of private rights was made by the framers of the Constitution. And if such choice has been found to be "a poor one," constitutional means should be resorted to for correction, rather than judicial fiat.

Respectfully submitted,

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DATED: November 24, 1952

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IN THE

Supreme Court of the United States

October Term, 1952.

No. 167.

UNITED STATES OF AMERICA,

Appellant,

JOSEPH KAHRIGER,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND SUPPORTING BRIEF.

THOMAS D. McBRIDE,

1529 Walnut Street, Philadelphia 2, Pa.

December, 1952



Supreme Court of the United States.

October Term, 1952:

No. 167.

UNITED STATES OF AMERICA,
Appellant,

JOSEPH KAHRIGER,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The movant Allan Cohen is a defendant in the United States District Court for the Eastern District of Pennsylvania under a two count criminal information charging the same offenses as those charged against Kahriger.

A motion to dismiss, supported by evidence, was made. The Court reserved decision pending the disposition of the Kahriger case by this Court.

All pending similar cases in the Eastern District of Pennsylvania have been continued pending such disposition.

Special reasons for granting this motion are contained in the accompanying brief.

ARGUMENT.

This brief is confined to two points deemed helpful and substantial but not fully covered in the arguments already before this Court.

I. The Statute Incorporates by Reference Specific Administrative and Penal Provisions of Other Federal Statutes Which Are Themselves Valid Only Because They, Unlike This Wagering Tax Statute, Cover Fields Within the Federal Power to Regulate.

The prosecution in its brief cited certain selected provisions of the wagering tax statute. The appellee cited more provisions. But the attention of the Court was not called to the fact that the provisions of a number of regulatory acts were incorporated by reference. These provisions, which form the administrative and mainly the penal bases of the whole Act, demonstrate plainly its purpose to use the taxing power to regulate intrastate activity which the Tenth Amendment forbids.

The statute, 26 USC 3287, so far as relates to the 10% excise tax provided for in subchapter A, incorporates the provisions, including penalties of the Act, applicable to pistols and revolvers: 26 USC 2700-2709. It also, 26 USC 3292, so far as relates to the provisions of subchapter B applicable to the special \$50 occupational tax, incorporates additional sections of other regulatory acts, such as 26 USC 3271, applicable to firearms: 3273(a) applicable, inter alia, to brewers, which itself again incorporates other stamp provisions relating to distilled spirits, fermented liquors, tobacco and cigars.

26 USC 2709, which is made applicable to the excise tax, provides:

"Every person liable to any tax imposed by this subchapter, or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe."

Wifful failure to do any of these things is made a misdemeanor by 26 USC 2707 and it is there provided (applicable alike to the excise tax, 26 USC 3287, as well as the special \$50 occupational tax, 26 USC 3294(c)) that in addition to other penalties provided by law that misdemeanor is punishable by the imposition of a fine of not more than \$10,000, or imprisonment for one year, or both.

Under 26 USC 3275(a), which is applicable to the

special occupational tax, it is provided:

"Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons was shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of \$1 for each one hundred words or fraction thereof in the copy or copies so requested, may be charged."

Hence, the prosecution, to sustain this statute, is compelled to ask that it be interpreted and considered like a regulatory statute.

That, however, would violate the well-settled rule that taxing statutes are strictly construed, particularly where they contain penal provisions, whereas regulatory statutes are liberally construed to effectuate the legislative purpose.

Here the prosecution is seeking to invoke two contrary interpretive approaches. In trying to avoid the effect of the *Tenth* Amendment it contends that it is not clear that

the business sought to be taxed is purely intrastate, and, when trying to avoid the effect of the Fifth Amendment, the argument is made, with equal earnestness, that it is not clear that the business is not purely intrastate.

It is submitted that cases like Shapiro v. United States, 335 U. S. 1, are inapplicable here. There, the majority held that the Federal Government had the power to regulate the business under the Price Control Act and therefore anybody in that business was in effect a licensee. Here, not only does the government not contend that the statute in effect licenses gambling but the statute and the regulations themselves insist that no license is granted. (26 USC 3276, Regulation 325.60.)

Shapiro, relying on Davis v. United States, 328 U. S. 582, and Wilson v. United States, 221 U. S. 361, limited its holding to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of government regulation. But no one pretends, least of all the Government, that, contrary to the Tenth Amendment, it has the power to regulate intrastate gambling.

The power to tax is not co-extensive with the power to regulate. Therefore cases justifying the requirement of keeping and producing "public records" because of a licensing or regulatory power are not applicable to this case.

II. This Statute Compels Self-incrimination Under Federal Law Not Merely Because of Possible Prosecution Under the Federal Lottery Law But Under This Very Statute Itself.

Under subchapter B, 26 USC 3290, it is provided that "A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable." (emphasis added)

Thus no one need pay, nor is liable for the special \$50 tax unless he has already become liable for the 10% excise

tax, either personally or through his principal.

Under 26 USC 3291 provision is made for a registration statement to be filed with the Collector, but this registration statement need not be filed unless the person is already liable for the special tax provided for in Section 3290. And by subchapter C the Collector may demand from time to time any supplemental information the Collector wants for the enforcement of the chapter provisions.

In addition, it is provided in 3294(c) that the penalties of Section 2707, referred to above in connection with the wilful failure to pay the excise tax, are also imposed for the wilful failure to pay the special occupational tax or to

file the required registration statement.

It seems clear, therefore, that liability to pay the special occupational tax of \$50 under Section 3290, or to file the registration statement under 3291, does not arise unless the person is either engaged as a principal in the business of accepting wagers or of conducting a wagering pool or lottery, or is engaged in receiving wagers for of on behalf of such principal.

Regulation, Section 325.25 provides that:

"(a) The tax attaches when (1) a person engaged in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, accepts a wager or contribution from a bettor. In the case of a wager on credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor."

Obviously no person "is liable for" the tax until he has participated in such a gambling transaction either as principal or agent. Once he has participated and has become liable for the tax, with its consequent duty of keeping daily records (26 USC 3287) and paying the tax, it seems clear that to require him then to pay a special tax which

would be an acknowledgment that he was liable for the excise tax, or to file a registration statement, which would also be an acknowledgment of his liability to pay the excise tax, for his past conduct, is to require him to be a witness against himself, since liability to pay the excise tax is at the very least a link in the chain of evidence necessary to be made out to subject him to the penalty for non-payment, or for failure to keep daily records. Hoffman v. United States, 341 U. S. 479; Blau v. United States, 340 U. S. 159.

Congress, in attempting under penalty to compel a person to do an act such as paying a special tax or filing a statement, either of which will constitute the giving of essential evidence to subject one to a penalty for having done or failed to do something else, has attempted an unconstitutional withdrawal of the protection afforded by the Fifth Amendment against self-incrimination.

The problem is not the same as that in an ordinary income tax return. This Court has held, in *United States v. Sullivan*, 274 U. S. 259, that one may not refuse to account for *income* because it was made in crime. But that case did not decide that one had to disclose that the income was in fact made in crime. On its face the income tax return requires a statement of amount and source of income. The source may be either criminal or non-criminal, hence it is for the taxpayer to make his claim of privilege.

In the present case, by reason of the inter-relation of the special tax and the registration statement to the past liability arising out of the excise tax and duty of making daily records, the payment of the special tax or the filing of the registration statement is necessarily evidential as to that liability. If there were no criminal penalty for failure to pay or report as to the excise tax, or if there were no criminal penalty as to the special tax or registration statement, the situation might be different.

The prosecution has suggested, by analogy to the case of E. Fougera & Co. Inc. v. City of New York, 224 N. Y. 269, that this statute contains something like a requirement of

a condition precedent to going into business and that it applies not to past conduct but simply to future conduct.¹ But Judge Cardozo was careful to point out in that case that the sale of medicines is a business subject to govern-

1. There is a certain ambiguity about this statute which should be called to the attention of the Court. Under Section 3290, referred to above, it would plainly appear that the duty to pay the special occupational tax does not arise unless he has already engaged in the business or has done an act of gambling. But Section 3294(a) provides as follows:

"Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000."

This seems inconsistent on its face, in that it speaks of an act which creates liability for the special tax but fixes a penalty for the failure to pay the tax even before the liability to pay it is created.

Also, Section 3292, which incorporates 26 USC 3271 by reference, provides:

"No person shall be engaged in or carry on any trade or business mentioned in this chapter until he has paid a special tax therefor in the manner provided in this chapter."

Hence, there seems to be a contradiction between the basic provisions of Section 3290, which create and fix the liability for the special tax, and the provisions of 3294(a) and 3271. This contradiction becomes even clearer upon referring to the regulations.

The regulation in effect between November 1, 1951, the date upon which the Act became effective, until September 1, 1952 reads in applicable part as follows:

"Every person engaged in the business of accepting wagers and liable to the 10% excise tax imposed by section 3285 of the Internal Revenue Code (see section 323.24 of these regulations) and every person receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is a commenced file a return on Form 11-C."

This comports with Section 3290 and the provisions of 26 USC 2701, incorporated by reference, which provided that the returns should be made monthly, and the provisions of Section 2702 that the tax should be paid at the time fixed in Section 2701 for filing return.

But on July 16, 1952, effective September 1, 1952, almost a full year after the conduct sought to be punished by these informations, the regulation was changed. Section 325.50 now provides:

"(a) No person shall engage in the business of accepting wagers subject to the 10 per cent excise tax imposed by section 3285 of the Internal Revenue Code (see section 325.24) until he has filed a return on Form 11-C and paid the special tax imposed by section 3290. Likewise, no person shall engage in receiving wagers for or on behalf of any person engaged in such business until he has filed a return on Form 11-C and paid the special tax imposed by section 3290 of the Internal Revenue Code."

This regulation therefore presently seems to have created the additional hazard that payment of the excise tax at the end of the first or any succeeding month necessarily incriminates as to a previous failure to register or pay the special occupational tax. Yet any such failure to pay the excise tax is penalized.

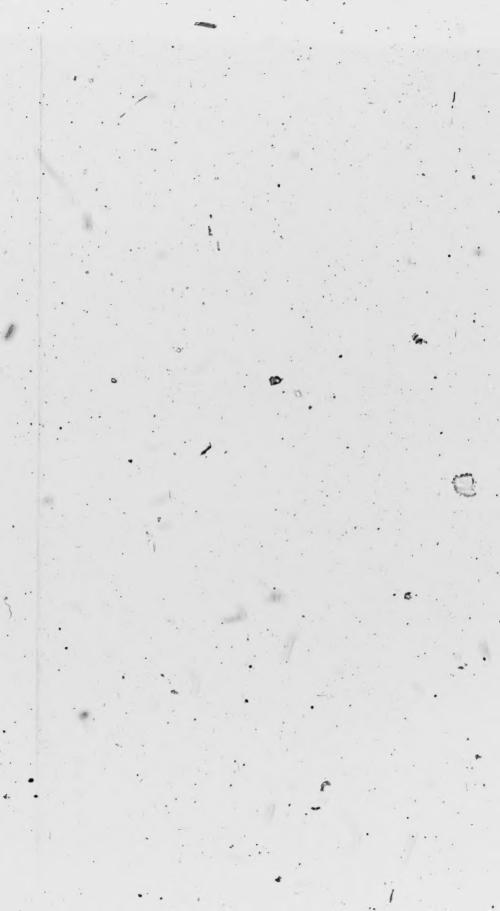
ment regulation and because of that it was within the power of a State to impose reasonable conditions on one's right to engage in the business.

Surely that is not true of all conduct, even future conduct. Could Congress validly say, either as a condition precedent or as a condition subsequent, that "Hereafter any person who violates any federal criminal statute must come in and tell us all about it"?

Respectfully submitted,

ALLAN COHEN,

By Thomas D. McBride,
Attorney.



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IN THE

Supreme Court of the United States

October Term, 1952.

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No. 167.

UNITED STATES OF AMERICA,
Appellant,

JOSEPH KAHRIGER.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

APPELLEE'S PETITION FOR REHEARING.

JACOB KOSSMAN, 1325 Spruce Street, Philadelphia 7, Penna., Coursel for Appellee.



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MISCELLANEOUS CITATIONS

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SUPREME COURT OF THE UNITED STATES.

October Term, 1952.

No. 167.

UNITED STATES OF AMERICA,

Appellant,

JOSEPH KAHRIGER.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Appellee on the grounds following, petitions for a rehearing of this Court's judgment:

- 1. The willful failure to register for the special occupational tax even if constitutional is not a criminal offense. Count II of the information does not charge a criminal offense since under the Act the willful failure to register is not a crime. Count II states (R. 2):
 - "* * Joseph Kahriger did engage in the business of accepting wagers and did accept wagers as defined in 26 U. S. C. Section 3285 and has willfully failed to register for the special occupational tax as required by

26 U. S. C. Section 3291, in violation of 26 U. S. C. Section 3294 and 2707 (b)."

But a willful failure to register is not made a crime under the statute. 26 U. S. C. (Supp. V) Section 3291 states:

"Each person required to pay a special tax under this sub-chapter shall register with the Collector of the district."

26 U. S. C. (Supp. V) 3294 entitled Penalties, in paragraph (a) penalizes the failure to pay the tax. In paragraph (b) penalizes the failure to post or exhibit the stamp. Paragraph (c) dealing with willful violations reads:

"The penalties prescribed by Section 2707 with respect to the tax imposed by Section 2700 shall apply with respect to the tax imposed by this subchapter."

Since no criminal penalties are provided for in the "Wagering Act" for failure to register, only for failure to post the stamp or pay the tax, Count II does not state an offense. This Court should affirm the order of dismissal on the ground that Count II of the information does not state a criminal offense. See *United States v. CIO*, 335 U. S. 106 (1948).

2. Statute misread. This Court has erroneously stated that "the wagering tax which we are here concerned applies to all persons engaged in the business of receiving wagers regardless of whether such activity violates state law." 26 U. S. C. (Supp. V) Section 3285 (e) excludes from tax, wagers of all persons if licensed under state law. In U. S. v. Constantine, 296 U. S. 287, the fact that the \$1,000.00 license tax applied to a local activity, control over which was reserved to the states by the Tenth Amendment, was proved by the reference in the statute there involved—as

here—to activities made illegal by state law. The statutes cited by this Court imposing taxes on colored oleomargarine, narcotics, firearms and marihuana, and lottery tickets and retailing liquor apply to all persons engaged in the business with no exclusion from tax if state licensed.

3. Erroneous rule applied. This Court stated that "Under the registration provisions of the wagering tax appellee is not compelled to confess acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."

But if Appellee acknowledged being engaged in any business that is unlawful, that fact would be relevant to prove that he had previously been engaged in that business. See Johnson v. U. S., 318 U. S. 189, 195-196. If therefore the proceeds of that business had not been previously reflected in his records or returns he could not possibly answer questions relating to that business without incriminating himself under Section 145 (c) or Section 3809 (a) of the Internal Revenue Code. And as the Court in Healey v. U. S., 186 F. 2d 164 (C. A. 9), said "what a lead to the Federal Bureau of Investigation to investigate the details of the relationship" an affirmative answer would give.

Under subchapter B, 26 U. S. C. 3290, it is provided that "A special tax of \$50 per year shall be paid by each person."

¹ This Court stated "Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power." Linder v. United States, 268 U. S. 5; and Trusler v. Crooks, 269 U. S. 475 were not overruled but soft pedaled in a minor key with a footnote, "but see."

This Court stated "But regardless of its regulatory effect the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid." What is disregarded was Commissioner of Internal Revenue John B. Dunlap's statement to the Senate Finance Committee of the cost of collection (Appellee's Br. 35).

who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable" (emphasis added).

Thus no one need pay, nor is liable for, the special \$50 tax unless he has already become liable for the 10% excise tax, either personally or through his principal.

Regulation, Section 325.25 provides that:

"(a) The tax attaches when (1) a person engages in the business of accepting wagers with respect to a sports event or a contest, or (2) a person who operates a wagering pool or lottery for profit, accepts a wager or contribution from a bettor. In the case of a wager on credit, the tax attaches whether or not the amount of the wager is actually collected from the bettor."

Obviously no person "is liable for" the tax until he has participated in such a gambling transaction either as principal or agent. Once he has participated and has become liable for the tax, and the duty of keeping daily records and paying the tax, it seems clear that to require him then to pay a special tax which would be an acknowledgment that he was liable for the excise tax, or to file a registration statement, which would also be an acknowledgment of his liability to pay the excise tax, for his past conduct, is to require him to be a witness against himself, since liability to pay the excise tax is a link in the chain of evidence necessary to be made out to subject him to the penalty for non-payment, or for failure to keep daily records.

The payment of the tax, registration, and the furnishing of information required by the Act could have incriminated Appellee under several federal statutes.

By paying the anti-gambling tax, defendant would confess that he is a "person who is engaged in the business of accepting wagers" or a "person who conducts any wagering pool or lottery." Section 3285 (d). This would be an admission of an essential element of the crimes prohibited

by the lottery statutes. Admissions of essential elements of crime are the strongest form of self-incrimination. See *United States v. Weisman*, 111 F. 2d 260 (2d Cir. 1940).

Furthermore, Section 3291 of the Wagering Act requires that the names and addresses of all employees be furnished to the Collector (now the Director). Registrants must supply all requested information to obtain the tax stamp, Form 11-C, Instructions, par. 4; moreover, Appellee could . not refuse to give the employee list and force issuance of the stamp by court order. Combs v. Snyder, 101 F. Supp. 531 (D. C. 1951), aff'd 342 U. S. 939 (1952). Such a list in itself would furnish proof of violations of the social security and withholding tax laws. Accord, Greenberg v. United . States, 192 F. 2d 201 (3d Cir. (1951)), rev'd 343 U. S. 918 (1952). In addition the list required would furnish the Federal Government with a list of witnesses that could be used against the Appellee in any prosecution here outlined. This is per se incriminating. United States v. St. Pierre, 132 F. 2d 837, 838 (2d Cir. 1942).

The payment of the tax and registration could also incriminate Appellee under the bribery and conspiracy laws, for they could form links in a chain of evidence to be later used against him. Hoffman v. United States, 341 U. S. 479 (1951). To plead the privilege it is not necessary for the admission directly to incriminate the Appellee. This rule was made most clear in Greenberg v. United States, 187 F. 2d 35 (3d Cir.) ordered reconsidered, 341 U.S. 944, reconsidered 192 F. 2d 201 (3d Cir. 1951), rev'd per curiam, 343 U. S. 918 (1952), where the defendant, pleading possible incrimination under federal tax laws, refused to reveal what his business was or whom he knew in the numbers racket. His contempt conviction was reversed by the Supreme Court on the authority of Hoffman v. United States, supra, even though no facts were shown that the defendant's business was illegal under federal law.

Given the name and address of the defendant from the public rolls (required by Section 3275), a federal prosecu-

tor would have an important piece of evidence to prove the existence of a conspiracy to violate any law of the United States, especially one of those here enumerated. Since much less need be proved for a conspiracy than for a substantive federal crime, an inference of possible incrimination is more readily drawn.

Therefore, judicial notice should be taken of the defendant's business, background, and the circumstances under which he is asked for information in order to judge the validity of the self-incrimination plea. Hoffman v. United States, 341 U. S. 479 (1951).

Since the Act as construed requires under penalty of law that the Appellee surrender self-incriminating information as the condition of obtaining the stamp tax, and punishes failure to obtain the stamp tax, it clearly violates the Fifth Amendment.³ Cf. Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 37 (1949); People v. McCormick, 228 P. 2d 349 (App. Dept. Sup. Ct., L. A. Cty., Cal. 1951).

³ This Court has applied a rule likely to plague it and the criminal law in cases to come, in saying: "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions. 13" The cases cited in the footnote are inapplicable here. In Davis v. United States, 328 U. S. 582, 590; and Shapiro v. United States, 335 U. S. 1, 35, the Federal Government had the power under the Price Control Act to regulate the business and require records to be kept in order that there might be information of transactions which are the appropriate/subjects of government regulation. In E. Fougera & Co. v. City of New York, 224 N. Y. 269, 281, 120 N. E. 692, the business was subject to government regulation and therefore the State could impose conditions on the right to engage in that business.

CONCLUSION.

Filing a Petition for rehearing is like courting a girl that is in love with someone else, but it is sometimes done for her own good.

Respectfully submitted;

JACOB KOSSMAN, Counsel for Appellee.

CERTIFICATION.

The foregoing Petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

JACOB KOSSMAN, Counsel for Appellee.

March, 1953.